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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 30

THE UNITED STATES OF AMERICA, APPELLANT

vs.

**UNITED STATES GYPSUM COMPANY, SEWELL L.
AVERY, OLIVER M. KNODE, et al.**

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FILED MARCH 14, 1950

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11684 In the District Court of the United States
For the District of Columbia

Holding a Three Judge Court

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS

Reporter's Transcript of Trial Proceedings

Court Room,
U. S. Court of Appeals Building,
Washington, D. C.,

Tuesday, June 8, 1948.

The above-entitled cause came on for discussion with respect to further proceedings at 10:00 o'clock a. m., pursuant to notice, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

11685

APPEARANCES:

On behalf of the plaintiff: Roscoe T. Steffen, Esq., and Edward Knuff, Esq., Special Assistants to the Attorney General.

On behalf of the defendants: Bruce Bromley, Esq., Hugh Lynch, Jr., and Murray W. McEniry, Esq., for the defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode. Elmer E. Finck, Esq., for the defendants National Gypsum Company and Melvin H. Baker. Charlton Ogburn, Esq., for the defendant Certain-Teed Products Corporation. Andrew J. Dallstream, Esq., Norman Waite, Esq., and Ralph P. Wanlass, Esq., for the defendants The Celotex Corporation. Joseph S. Rippey, Esq., for the defendants Ebsary Gypsum Company, Inc., and Frederick G. Ebsary. James O'Donnell, Jr., Esq., for the defendants

Newark Plaster Company and Frederick Tompkins, Scott P. Crampton, Esq., for the defendant Samuel M. Gloyd, doing business under the trade name of Texas Cement Plaster Company.

11686

Proceedings

Chief Justice STEPHENS: The Court has received the mandate of the Supreme Court in this case and also the letter of the Government requesting a conference of all counsel.

That letter suggested that the Government wished to propose a plan with respect to the further progress of the case.

We will hear from the Government on that subject.

Mr. RIPPEY: If the Court please, I am appearing for the first time in this case on behalf of the Ebsary Gypsum Company, Inc., and Frederick G. Ebsary.

I should like to ask the permission of the Court to enter my appearance for the purposes of this case.

Chief Justice STEPHENS: Will you state your name?

Mr. RIPPEY: Joseph S. Rippey.

Chief Justice STEPHENS: Your appearance may be entered.

Opening Statement on Behalf of the Plaintiff by Mr. Steffen

Mr. STEFFEN: Your Honor, I have submitted to the Court an order on the mandate of the Supreme Court, and I believe it is on your Honor's desk. It vacates the judgment entered on the 5th of August, 1946, and restores the case to the docket for further proceedings. I think it is a formality. Copies have been served on the other side.

Chief Justice STEPHENS: Do the defendants have any comment on this proposed order?

11687 Mr. BROMLEY: May it please the Court, only that I think it is unnecessary.

Mr. STEFFEN: May I make a statement, further, your Honor?

Chief Justice STEPHENS: You may.

Mr. STEFFEN: We consulted Mr. Hull, the Clerk, and he states that that is the usual practice in the District, and we simply attempted to conform with that.

Chief Justice STEPHENS: We think it is probably unnecessary in view of the form of the mandate in the Supreme Court. However, it probably will do no harm to sign it, but we will postpone action on it until we heard further from the Government as to its plan with respect to the

further progress of the case. It might bear some relation to that, so we will postpone it temporarily.

Mr. STEFFEN: I can state very briefly what our plan is: With the case reinstated, the matter comes back to the Court for purposes of further proceedings, and in normal course the defendants would go forward with their evidence.

The complexion of the case is somewhat changed since it was argued before your Honors, and I think that probably your Honor's duties have been somewhat augmented since that time, and our purpose—

Chief Justice STEPHENS: (Interposing) I am sorry, I didn't quite understand that.

Mr. STEFFEN: I say I think your Honor's duty as 11688 Presiding Justice here have been somewhat augmented since the time of the argument and that our purpose is to see if some means cannot be worked out whereby we can bring the case to as early a conclusion as possible.

Some of the matters that were gone into on the Government's proof now become more or less immaterial, in view of the Supreme Court's holding.

Contrariwise, some of the evidence that the defendants might have originally intended to put in by way of countervailing that proof becomes unnecessary; and, therefore, what we are suggesting as a preliminary matter is that the Court designate a date, possibly two weeks hence, at which we can have a conference, pre-trial conference, under Rule 16 or under the inherent power of the Court to, at any point in a proceeding, take hold of the proceeding and find out what the remaining issues are, in order that we can determine what time will be required to hear the rest of the case.

Judge JACKSON: Could that be done now?

Mr. STEFFEN: It could be done now, as far as we are concerned; but I think the defendants are perhaps entitled to more time, because what I would specifically want to know would be the categories of evidence which they feel they are now entitled to put in, in view of the holding of the Supreme Court.

I think that there is no question of the power of the Court to proceed; it is a question of whether your Honors 11689 feel that that is the most expeditious way of getting at this matter.

Chief Justice STEPHENS: Thank you, Mr. Steffen.

What do the defendants have to say, if anything, on this subject of further proceedings?

Statement on Behalf of the Defendants by Mr. Bromley

MR. BROMLEY: May it please the Court, what I have to say depends to some extent upon an understanding of what the opinion of the Supreme Court means. I am sure that I am not clear about that, nor am I clear as to the Government's position as to what it means.

I should think that if the Government thought that the opinion meant that a mere plurality of licenses which resulted in the licensing of an entire industry with price fixing under bulletins was illegal, that they would take an affirmative step, say in the way of a motion for summary judgment.

There has been some talk between some representatives of the Department and me about that matter. I take it that they have not, as yet, made up their minds.

It seems perfectly clear, however, that if they make up their minds that they can not prevail in such a motion, that then the Government and the defendants would be in agreement on the proposition that the Supreme Court did not mean to announce any such doctrine as that a mere plurality of licenses extending industry wide with price fixing
11690 under bulletins resulted in a violation of the Sherman Act.

Judge GARRETT: Mr. Bromley, may I inquire?

A motion for reconsideration by the Supreme Court was made; was it not?

MR. BROMLEY: Yes, your Honor.

Judge GARRETT: It was denied, without opinion?

MR. BROMLEY: Yes, your Honor.

Judge GARRETT: May I inquire: Were they asked to clarify that point in the motion for the new trial?

MR. BROMLEY: No, your Honor, not specifically.

Chief Justice STEPHENS: Proceed, Mr. Bromley.

MR. BROMLEY: Therefore, I should like to devote a few moments to a consideration of what I think the opinion of the Supreme Court means.

I suppose we can start off on the proposition, as to which there will be no disagreement—

Chief Justice STEPHENS: (Interrupting) Before you proceed, let me send for some material.

(Short interval.)

Chief Justice STEPHENS: Proceed.

MR. BROMLEY: We can all agree, I think, that the Supreme Court has not overruled the General Electric case and that it stands today, still stands, as the law. I refer

in support of that, if any support is needed, particularly to the Line Material opinion, on page 23 of the slip 11691 opinion, in which the Court said that it was "called upon to make an adjustment between the lawful restraint on trade of the patent monopoly and the illegal restraint prohibited broadly by the Sherman Act," and then had this to say, and I quote it—

Chief Justice STEPHENS: (Interposing) What page?

Mr. BROMLEY: Page 23 of the slip opinion in Line, the majority opinion. The first full paragraph on page 23. I have summarized the first sentence beginning "We are thus called upon", and I was about to read the second sentence.

"That adjustment has already reached the point, as the precedents now stand, that a patentee may validly license a competitor to make and vend with a price limitation under the General Electric case and that the grant of patent rights is the limit of freedom from competition under the cases first cited at note 22."

So, I say the General Electric case has not been overruled.

Chief Justice STEPHENS: Let me read that again. I am sorry, I don't put my eye on it.

Mr. BROMLEY: That is page 23, the first full paragraph, about seven lines down, beginning "We are thus called upon".

Chief Justice STEPHENS: There were several opinions in that case.

Mr. BROMLEY: Yes, sir, this is the first, the majority; the first, page 23. The paragraph begins "We are 11692 thus called upon".

Chief Justice STEPHENS: Yes, very well.

Mr. BROMLEY: So, with the General Electric case being still the law and not being overruled, I proceed to the second point, which I think is equally clear, and that is that a plurality of licenses is lawful. That is, perhaps I should say, a mere plurality of licenses; that, if all the proof amounted to was that there was a plurality of licenses, that *ipso facto* by itself would not offend the Sherman Act.

Now, I reach conclusion because, again, of the Line Material case in which there was a plurality of licenses, and it seems to me that the majority opinion—indeed, all the opinions—are implicit with the proposition that if there had been no cross licensing between Line and Southern the case would have been decided in favor of the defendants.

Again, at page 23 of Line Material, near the bottom, six lines up, the Court said:

"Where two or more patentees with competitive, non-infringing patents combine them and fix prices on all devices produced under any of the patents, competition is impeded to a greater degree than where a single patentee fixes prices for his licensees."

I gain support for my position from the fact that I consider that to be an explicit recognition of the legality of plurality of licenses. Furthermore, and perhaps 11693 more important than a mere passing phrase from a sentence, it would have been completely unnecessary to have considered the cross-licensing feature of the case in Line Material if the Court had been of a view that a plurality of licenses extending throughout an industry, as it did there, by itself would have offended the Sherman Act.

So, I say the General Electric case is still law and both cases, Line and Gypsum, recognize that in some circumstances—which I will proceed to consider later—plurality of licenses is still lawful and mere plurality of licenses does not offend the Sherman Act.

Now, coming to our case: Just what did the Supreme Court mean in holding that under the licenses and the price bulletins there was a *prima facie* case of illegality which made the declarations receivable against all?

I know that there are sentences in the opinion in the Gypsum case such as the one beginning in the fourth line on page 34, the fourth line from the top on page 34, of the majority opinion in the Gypsum case:

"These licenses and bulletins show plainly a conspiracy to violate the Sherman Act."

Well, read alone and isolated one might think that that was a statement that the licenses and bulletins in our case without more, without any more, had been adjudicated to be violative of the Sherman Act; but I do not believe 11694 that that can be said to be the intent of the opinion, and I call attention to the bottom of page 34, in the last paragraph, the fifth line up from the bottom, in which the Court is speaking of the General Electric case and says:

"That case"—meaning General Electric—"gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products sup-

pressed; a class of distributors squeezed out, and prices on unpatented products stabilized."

Then, on page 35, five lines from the top, the Supreme Court, it seems to me, sums up the situation in these words:

"Even in the absence of the specific abuses in this case, which fall within the traditional prohibitions of the Sherman Act, it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices."

Now, I submit that that enunciates a doctrine which draws a very fine line indeed. It does not quite approach the theory of the complaint and the theory about 11695 which we had so much argument—that is, sham.

In my judgment, it does not say that the licenses need be sham. I think it completely misinterprets the position of this Court with respect to that proposition but I think that it holds that something less than a conspiracy to utilize licenses as a sham or a cloak or a cover-up may still offend the Sherman Act and that something less is to be found in the words "acted in concert".

Now, giving the opinion all the force that it should be given, this would mean that if there was an agreement among the licensor and the licensees that prices were to be fixed and the industry regulated and prices stabilized, that would be a step beyond the permissible limit of the patent monopoly, even if that plan or agreed concert of action was to be effectuated by license agreements.

Now, of course, as this Court's opinion so clearly pointed out, it is very difficult to see any real distinction in the result between the negotiations which, necessarily, must accompany the issuance and acceptance of licenses and the discussions which, necessarily, must be carried on with respect to them and the position of the Supreme Court, as I read it, that those negotiations may be lawful but they are not lawful if they have resulted in an understanding throughout the industry that the industry is to be regulated and prices are to be fixed and it is understood that 11696 the licensor—that is, the patent owner—when he issues the licenses does so for the purpose of regulating and stabilizing the industry and it is not merely a patentee acting independently and for the protection of his patent and for the realization of the maximum profit therefrom.

Issuing licenses with the same terms—the latter would be all right, if a licensor sent out to everybody in the industry an identical license with price fixing and all the other provisions contained in the licenses in this case, and there wasn't a word said by anybody except everybody sent the licenses back signed—I take it that under the doctrine of the Supreme Court in this very Gypsum situation, they would say that was lawful, but if the preceding discussions and negotiations, as colored by the declarations, lead to the conclusion that the action was not the independent action of the licensor but was understood by everybody to be an arrangement to stabilize the industry pricewise and in other respects, too, then I think the Supreme Court by this opinion has said that that would offend the Sherman Act.

But the point that I want to make is that it still leaves the defendants with a defense to put in, and that defense is to show that the true facts here fall into the permissible category and not into the illegal.

I think we are entitled to show a thing which we have not shown, which has not been shown in this case to any considerable degree, that the licensor in this situation 11697 acted with complete independence and never was a party to any understanding or arrangement with any licensee with regard to the stabilization of the industry. I think we are entitled to show by witnesses and lawyers connected with the licensor during the times in question that all that was done was for the owner of a patent to protect his rights; to sue those who infringed it, to try to collect damages from those, and to offer a license to anybody who wanted it, completely without regard to whether all would take it or whether only one would take it or whether two or three, and I think if we establish that through the testimony of the licensor and perhaps from some of the licensees who have not been heard from, that we may succeed in convincing the trier of the facts that there was no pre-arrangement but that all that went on here was merely the normal activities of a licensor interested in preserving his patent and his position.

Now that, in very brief outline, is my position with respect to the meaning of the decision and with respect to what it is I desire to put in by way of defense. Of course, there are collateral issues, such as the elimination of jobbers and open-edge board and the alleged resale price fixing and operations of Board Survey, as to which we also would desire to offer additional evidence through the lips

of the secretaries of Board Survey who ran Board Survey and who conducted the correspondence in the effort 11698 to enforce the licenses and through the sales people and others to explain the origin, meaning, extent, and effect of the provisions with regard to the imposition of royalties on all products whether patented or unpatented, and so with respect to every one of the four collateral issues.

9 We think we are entitled now to put in that kind of a defense, and we think that the clear meaning of the opinion of the Supreme Court gives room to defend on those grounds and that the Government still has the burden of showing that there was a pre-arranged scheme which went beyond the mere activity of a patent owner in doing what the General Electric case says he could do—that is, license with price fixing.

Chief Justice STEPHENS: Any other representatives of the defendants wish to be heard?

(No response.)

Chief Justice STEPHENS: Mr. Steffen?

Further Statement on Behalf of the Plaintiff by Mr. Steffen

Mr. STEFFEN: I would like to say just a few words in connection with Mr. Bromley's argument, your Honor.

With respect to the motion for summary judgment, our purpose, in part, in holding a pre-trial conference in order to determine what the actual issues are, is to determine whether we are in position to proceed to move for summary judgment. I think we will have to define them 11699 somewhat more definitely than we have before we can take a position on that.

I would like now to reply, in part, to Mr. Bromley's statement with respect to the petition for rehearing before the United States Supreme Court. I don't know that Mr. Bromley gave Judge Garrett quite the right impression.

There was a petition for a rehearing, and in that petition for a rehearing the defendants made the very point which Mr. Bromley has urged here this morning; that is, that under the Line Material case that if there was not something more than a mere plurality of licensing, that it might be perfectly legal.

His first point was that the General Electric case has not been overruled.

Chief Justice STEPHENS: Referring now to petition for rehearing?

Mr. STEFFEN: I am referring to Mr. Bromley's argument and to page 6 of the petition for rehearing.

Chief Justice STEPHENS: Judge Garrett wants a copy of that petition, and I have an extra one here.

Mr. STEFFEN: That is page 6, Judge Garrett, along about the middle of paragraph (c).

Judge GARRETT: Whereabouts, on page 6?

Mr. STEFFEN: Beginning with the words "If the rule", about the middle of paragraph (c) on page 6.

I am calling your honor's attention to this, because this was the argument made before the Supreme Court 11700 on the petition for rehearing, and they there said:

"If the rule of the General Electric case recognizes the right, as we insist it must, of the patentee to licensee the industry, how could the intention of the patentee disclosed to its licensees or the intention of the patentee and some or all of its licensees to make the licensees 'industry-wide', take the case out of the rule of the General Electric case?"

In other words, they raised exactly the point there that is being urged here, and our contention is clear that if those arguments were presented to the United States Supreme Court on their petition for rehearing and the petition was denied, it is equivalent to a ruling contrary to their argument.

Now they are a little more explicit. Mr. Bromley argued that the Line Material case went the way that it did only because of the fact that it involved cross-licensing, and if it were merely a plurality of licenses, that the court might have decided the other way. And to show that he made that argument to the Supreme Court also, refer to page 9 in the middle of the first paragraph, where it says:

"If that case, instead of involving cross-licensing which was the turning point in the opinion, had involved merely plurality of licenses, the Court would have 11701 been compelled under the language of its own opinion to affirm the District Court, for did not the Court say that the adjustment between the lawful restraint of the patent monopoly and the illegal restraint prohibited broadly by the Sherman Act had reached the point, as the precedents now stand, that a patentee may validly license a competitor to make and vend with a price limitation under the General Electric case?"

In other words, the two points with which Mr. Bromley started out this morning have been presented, were presented to the Supreme Court; and the Court in its refusal

to grant a rehearing must be deemed to have been fully advised of the arguments that are now being made and to have taken the position that they did not affect the generality of the language which Mr. Bromley was reading from its opinion.

Now, I think that the language of the Supreme Court in the Gypsum case is extremely broad and that it reaches to the point of saying, just as we argued, may I say, back at the time of the trial, that any combination of competitors which has the result of organizing an industry and effecting a stabilization of prices, together with a regulation of distribution, is illegal.

Now, the language—there are some sentences Mr. Bromley didn't quote, in the opinion. If you will look at page 35 of the opinion, there is a sentence that, it seems to me, answers this case. It says:

"The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly."

Now, there are no "ifs, ands, and buts"; that is just a flat statement that where you have an entire industry organized under patent licensing agreements and where, as in this case, you have admitted price fixing, you have admitted control of distribution, that those rewards which are derived from that combination do not flow from the patent, and it follows, of necessity, as we see it, that the combination, which I take it is agreed to—Mr. Bromley doesn't suggest that he is going to challenge the question of whether they fixed prices—I think it is perfectly clear they did fix prices, and he said in his opening statement that they did fix prices among their competitors—that the combination is such that there is no question but what they have regulated distribution through the price bulletins; there is no question that they have placed their regulations under Board Survey; there is no real question that they eliminated jobbers by virtue of their leveling off of the price; therefore, that it is squarely a combination of an entire industry squarely within the language of the Court to restrain commerce, and it is unlawful under the Act.

Now, if that is the case—and that is our position—then the matters which caused us much debate when the case was here before, as to whether or not there was sham in the situation, is out the window. Sham is no longer im-

portant. The case is simply one of: Did you combine and organize an industry and are you today, or at least as of November, 1929, were you, a combination of all the competitors astride the industry, fixing prices, organizing it? And, if so, regardless of how you got there—this is an equity case—regardless of how you got there, you are a combination in restraint of trade, and the rewards which you are getting, the Court said, are not rewards flowing from the patent and they are not protected by anything said in the General Electric case.

The Court's language on that is extremely potent, we think. The Court said:

"That case gives no support"—

Chief Justice STEPHENS: What page?

Mr. STEFFEN: I have the Federal supplement. I think it is on page 34.

Chief Justice STEPHENS: Of the Gypsum opinion of the Court?

Mr. STEFFEN: Page 34 of the slip opinion.

"That case gives no support for a patentee acting in concert with all members of an industry, 11704 to issue substantially identical licenses to all members of the industry."

There isn't any question but what they have acted in concert. Whether there was pre-concert to do this is beside the point. They did act in concert.

They did "issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed," competitors, that is, jobbers, "squeezed out, and prices on unpatented products stabilized."

Now, the Court said:

"Even in the absence of specific abuses in this case"—that is, even in the absence of eliminating jobbers or stabilizing or tampering with price of plaster or matters of that sort which would normally make a case.

"Even in the absence of specific abuses in this case, which fall within the traditional prohibitions of the Sherman Act, it would be sufficient to show that the defendants,"—and this is the case—constituting all former competitors in an entire industry,"—there is no question about that; they are all former competitors in the entire industry—"had acted in concert to re- 11705 strain commerce"—and from 1929 on, to date, we

showed an abundance of concerted action; licensee meetings, the price bulletin, the Board Survey, they were acting in concert from then on most certainly—"had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices."

In other words, the Court says that if you have got concerted action, you have got stabilization of prices among erstwhile competitors. The fact that they may have used the patents, the fact that any particular patent license may have been lawful is immaterial. You may use lawful steps to carry out an unlawful restraint or combination in restraint of trade.

Now, if that is all true—and that is the Government's position, your Honors, it leaves very little for the defendants, if anything, to introduce by way of evidence.

Judge JACKSON: That would all depend upon our interpretation of the Supreme Court's opinion?

Mr. STEFFEN: Yes, and it is a law question, and our thought in the matter, your Honor, is that in order to save a lot of waste motion possibly we could get some sort of an understanding on that in these early stages. It seems to us that we ought to come to some agreement on how much evidence and on what categories of evidence the defendants should be permitted to proceed.

Then, if we get the matter to a point where we feel that there isn't anything substantial left, we will then, if necessary, move for summary judgment. That would be one way to bring the matter to a head, but we do not have any desire to do that if there is any way of getting at it in a more satisfactory manner.

But our position is clear, that the whole question of sham and the whole question of whether the rewards are beyond what is proper under the General Electric doctrine are out; and that leaves you with nothing but an existing combination—note carefully that while we went in with great care back in 1925 to '29 and into how the thing started, much of that, I feel, today is unnecessary. The fact that we are dealing right now with a combination in existence and the fact that it does restrain trade (inasmuch as the Court says that the rewards are beyond what they were entitled to under their patents) are ground for equitable intervention.

I might point out further that much of Mr. Bromley's testimony or prospective testimony concerning the patent infringement and litigation, and so on, doesn't quite reach

this case. This case, as it is looked at now, the licenses that are now before your Honors were signed in November, 1929, and there isn't much doubt on the record—and I would like to hear from Mr. Bromley if he has any real
 11707 doubt on the matter—not much doubt on the record that from the time of the May, 1929, agreement and during the summer of 1929 that the whole industry did meet and that the whole industry did discuss in great detail the licenses under the Foam Patent and the licenses under the Starch Patent, so there isn't any question but what there was pre-concert in the sense of getting together with the idea of having the whole industry licensed.

We have the National Gypsum Company and even Mr. Finck in his opening statement saying that they went into the November licenses and only went into them the way they did on the understanding that the whole industry would come together and there would be a lawful price control. He was in error as to "lawful", according to the Supreme Court, but there is no doubt that that is what they intended to do.

I should like to hear further from Mr. Bromley if he would care to be a little more precise on what he feels he could introduce. I think it has a definite bearing on when you may set the case for trial, how long it would take, and on the question of whether we feel we should move for summary judgment.

Chief Justice STEPHENS: Let me ask you one further question. Is it the purpose of the Government to introduce evidence with respect to the validity of the patents?

Mr. STEFFEN: We would like to hold that to one side.

I would say frankly, your Honor, we haven't made
 11708 up our mind entirely. If this case can be handled without it, we would be very glad to. It opens up another topic, which it seems to us would take quite a lot of time.

We want to reserve our rights, but we have no immediate intention of doing that.

Chief Justice STEPHENS: Mr. Bromley, do you wish to be heard further?

*Further Statement on Behalf of the Defendants
 By Mr. Bromley*

MR. BROMLEY: May it please the Court. I still do not understand the Government's position with respect to the opinion.

Judge JACKSON: But, Mr. Bromley, if we should disagree with your interpretation of that opinion, then, the motion for summary judgment would be in order?

Mr. BROMLEY: Yes, sir, if you disagreed with it to the extent of saying that a mere plurality of licenses offended the Sherman Act.

Judge JACKSON: Under the circumstances of this case.

Mr. BROMLEY: Yes. But it isn't possible, it seems to me, to agree with Mr. Steffen's interpretation, if I understand it correctly, that is, that the mere taking of the licenses in the circumstances was taken in concert, and that you don't need to show any pre-concert, as he called it.

Maybe he has put his finger on a distinction 11709 which I had not made clear. Maybe there is a difference between concert in taking the licenses and pre-concert in agreeing to a plan of industry stabilization through licenses; but if the Supreme Court did not mean by its opinion that there must be a prearrangement, a plan to stabilize the industry in the sense in which I have been trying to say it, why in the world would the Supreme Court say, as it did at the bottom of page 27 of the opinion, "The trial court made findings of fact which if accurate would bar a reversal of its order"?

Now, what in the world can that mean, especially when one turns over the page and finds that the Supreme Court goes right away to Finding 118?

The very next sentence is:

"In Finding 118 the trial court found that the evidence 'fails to establish that the defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices.'"

Doesn't that mean that the defendants should be permitted to show, if they can, that there was no plan?

Now, how can they show there was no plan?

Let's go to the May, 1929, meetings. It depends upon what the evidence shows was the purpose of those meetings and what went on at the meetings.

Judge JACKSON: Wasn't that all thoroughly brought out in the Government's case by your cross-examination 11710 as far as you and your clients are concerned?

Mr. BROMLEY: No, sir.

Judge JACKSON: I thought it was.

Mr. BROMLEY: Yes, your Honor's statement is quite right with this exception. We have not presented the evidence from the lips of any representative of the licensor. For in-

stance, neither Mr. Avery nor Mr. McLeish, the lawyer at whose instance the meetings were called, who participated in the discussions and negotiations that went on there, have told the story from their standpoint, and they are the only ones who know the whole story.

Judge JACKSON: What difference would that make in view of the record as it stands now?

Mr. BROMLEY: Well, might this not make a difference, sir: Suppose that after the men got to the meetings negotiations were conducted by the licensor's counsel separately with each licensee, that there never was any joint discussions which could possibly be susceptible of the inference that there was a common understanding that licenses would be issued and that the licensor would exercise his right to fix prices?

Judge JACKSON: You think that would change, then, the ultimate situation?

Mr. BROMLEY: Yes, sir, I think that if we could show that it was the licensor's position that it didn't be-
11711 come a party to any understanding at all, that it never indicated that it would fix prices, that it would do anything—all it did would sign a contract that gave it the right, if it wanted to, to fix prices—and if we could show that the negotiations that there were conducted were separate independent negotiations conducted with each one separately in a different room without any common meeting or any discussion which in words or inferences could possibly justify the conclusion that there was an arrangement among everybody to stabilize the industry as distinct from a straightforward negotiation to offer and take a license—I say, again, if we could show—and I say this only for purposes of illustration—that there never was a May meeting, that instead of that we wrote identical letters to every licensee on May 21, 1929, and enclosed a copy of the license and we got the signed copy back, I think that would be a good defense. No discussion of any kind; the parties never met—suppose, I could prove that, that they never met, just sent the licenses out and they were signed?

Now, all I am struggling to point out in answering your Honor's question is that there is some defense which this opinion allows us to put in.

The most extreme illustration that I can think of is the one I mentioned, that the parties never met, but they sent out the licenses on the same day, if you will, with an identi-

11712 cal letter and an identical license, and they came back all signed.

Now, that might raise an inference under the Interstate Circuit case, that there must have been an understanding, else they wouldn't have all come back, else they wouldn't have all been sent out on the same day. But surely the defendants ought to be permitted to call the man who wrote the letter from the licensor to testify that he never talked to anybody and he did it on his own volition and independently and that he had no understanding that if the licenses were signed that he would fix prices—sure, the right was reserved in the license; he had no understanding that he would stabilize the industry, nor that he even would fix a price.

Judge JACKSON: But you are up against the barrier, aren't you, that price fixing was had and stabilization did occur?

How are you going to get over that?

Mr. BROMLEY: Well, I can't deny the fact that prices were fixed until 1941. If there had been an arrangement, I urge, to stabilize the industry, we would not have stopped price fixing when our fundamental Starch Patent ran out, but I don't think it conclusive against us, sir, that there was price fixing. I do not think we are condemned unless you find that the price fixing which we did was done pursuant to a pre-concert understanding that we would do so, and that it was the purpose of the licenses to stabilize the industry and not the purpose merely of the patent owner to realize the full benefit of his patent.

I know that is a very, very fine line.

Judge GARRETT: Mr. Bromley, may I interrupt for a moment?

On page 33 of this opinion, that paragraph beginning "The trial court made many other findings to which the government objected", and so on, and which winds up, "Enough has been said as to the findings and the evidence, we think, to enable the District Court to pass upon the facts that may come before it on further proceedings in accord with our present ruling."

Now, we made findings of fact which the Supreme Court has expressly reversed and giving their authority for doing so. What is the significance of that?

Suppose you make the proof? Suppose you call Mr. Avery, suppose you call Mr. McLeish, and they testify as you think they will; how far does that get us?

Would not the Supreme Court again say, if we should hold that that established the crossing of that fine line to which you refer, in the light of all the reasoning of the Supreme Court here in its statement—would not the Supreme Court again say, “Well, we don’t think that is so”?

I just wonder about it.

Mr. BROMLEY: I can’t believe that, if this Court was convinced by the evidence that we introduced sufficiently to make a new Finding 118, that the Supreme Court would upset it again. I can’t believe that would happen, 11714 because that presumably would be done with a view of the case which the Supreme Court has announced, that is to say, there must be proof that there was some arrangement, some action which was understood to be concert of action to secure stabilization of the industry, as distinguished from the mere taking of the licenses, even though the taking might be said to be in concert in the sense that all took the ’29 licenses at or about the same time.

I don’t think that is the kind of concert of action that the Supreme Court is talking about. I think, in these many sentences—While I am on that subject, page 23, I think, is an illustration of what I am talking about, starting at the very top of the page:

‘A consideration of that point’—they are talking about declarations—“really involves the heart of the case since the treatment of the declarations may vitally affect the outcome.”

Now, how could the treatment of the declarations vitally affect the outcome unless the Court was thinking there must be proof of something more than the mere taking of the licenses?

When you reflect upon the nature of the declarations and reflect that the Supreme Court is saying if the Court had received all these declarations and treated them as evidence binding on everybody, it might have reached a different conclusion. About what? About whether 11715 or not there was a plan. What kind of a plan? A pre-arrangement, a plan to stabilize the industry and not merely a determination on the part of the licensor to gain the full benefit of his patent, which was acquiesced in by the licensees when they took the licenses.

Chief Justice STEPHENS: What about the next statement, two sentences below, Mr. Bromley, where the Court says:

“We think that the industry-wide agreements entered into with knowledge on the part of the licensor

and licensees of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins, were sufficient to establish a *prima facie* case of conspiracy."?

Now, is there any dispute of fact in the case that there were industry-wide license agreements?

Mr. BROMLEY: No, sir.

Chief Justice STEPHENS: Entered into with knowledge on the part of licensor and licensees of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins?

Mr. BROMLEY: Well, now, I have difficulty with admitting that in this case the industry-wide license agreements were entered into with knowledge of the adherence of the others, because I don't think you can tell what they are talking about. If they are talking about "entered into with knowledge of everybody that there was a pre-arrangement, that there was a plan to stabilize the industry," which is something bigger than a mere licensor's determination to license, then that makes sense; and that is what I think they are talking about.

I don't think they meant to say that if industry-wide license agreements are entered into and at the time they are entered into everybody knows what everybody else is doing, that would be bad; but if you could prove that nobody knew what anybody else was doing, then industry-wide licenses wouldn't be bad. They can't mean that. That doesn't make any sense. I think they are merely stating the conventional doctrine that where there is an illegal conspiracy and somebody comes along and enters into the arrangements with knowledge of the conspiracy, he becomes a part of the conspiracy.

Now, I gain comfort for that, because of the preceding sentence, if your Honor pleases, as well as the succeeding sentence. The preceding sentence is:

"Some may have doubts as to whether the agreements and bulletins are sufficient to establish a conspiracy but the admission of the separate declarations against all greatly strengthens the government's position."

Chief Justice STEPHENS: And the Supreme Court has abolished, has it not, the declarations rule, or has it?

11717 Mr. BROMLEY: I just don't know. It seems to me it probably has.

Judge GARRETT: It certainly held that the declarations of one party can be taken against the whole.

Chief Justice STEPHENS: Where is the comment on the declarations?

Judge JACKSON: That is in this case, the circumstances of this case.

Judge GARRETT: That is what I mean.

Chief Justice STEPHENS: In effect, that is the declarations part of the case that you have just been reading.

Mr. BROMLEY: Yes.

Judge GARRETT: (Reading)

"We are unable to accept, however, the ruling of the court that declarations of each defendant were admissible only against the defendant making the declaration."

And immediately they hold that it is admissible against all. That is the way I interpret it.

Chief Justice STEPHENS: The Court goes on to say:

"Each licensee, as is shown by the uncontradicted references to the meetings and discussions that were preliminary to the execution of the licenses could not have failed to be aware of the intention of United States Gypsum and the other licensees to make

11718 the arrangements for licenses industry wide.

The license agreements themselves, on their face, showed this purpose."

It seems to indicate in that part of the opinion that the undisputed contents of the license agreements convict the defendants of conspiracy.

Mr. BROMLEY: Well, I have great difficulty seeing how the license agreements themselves showed the purpose referred to in the preceding sentence. What they say in the preceding sentence is that,

"Each licensee * * * could not have failed to be aware of the intention of United States Gypsum and the other licensees to make the arrangements for licenses industry wide."

The Court evidently concluded that there was a *prima facie* case of a pre-arrangement, and all that sentence means is that in their view, there being a pre-arrangement, they were convinced that everybody knew about it, and I think the statement that the license agreements showed this on their face may only mean to say that you can make an inference from the fact that the agreements were all the same, that there was a pre-arrangement.

Of course, that, I submit, respectfully, is absurd because license agreements would have to be all the same.

Chief Justice STEPHENS: Anything further from any other defendant's counsel?

11719 (No response.)

Mr. BROMLEY: I think probably, with respect to the declarations rule—I don't know that they have abolished the rule, but they have merely said that there was a sufficient *prima facie* case of a combination to make the declarations admissible.

Chief Justice STEPHENS: That may be.

Anything else from any other defendant's counsel?

(No response.)

Mr. BROMLEY: I wonder if the Government—

Chief Justice STEPHENS: (Interposing) I am sorry, Mr. Bromley, I thought you were through.

Mr. BROMLEY: I wonder, if the Government goes through with this idea, if it wouldn't be a good thing for them to serve interrogatories on us so we can have an opportunity to get a definite question and give a definite answer?

Judge JACKSON: As to what?

Mr. BROMLEY: They say they want to ask us some questions, I suppose to bring out what it is we want to prove.

Wouldn't the best way to do that be for them to serve interrogatories upon us?

Does that appeal to you (addressing Mr. Steffen)?

(No response.)

Chief Justice STEPHENS: If there is nothing else to be said for the moment by either government or defendants—I am sorry, Mr. Bromley, I thought you had finished.

Mr. BROMLEY: I had finished, except I did want to say that we feel we are entitled to know from the Government whether their case is going to stay rested or not, that they should tell us before we go ahead whether they will attack the validity of the patents or not, because that is part of their case.

Judge JACKSON: I thought that was answered by Mr. Steffen.

Mr. BROMLEY: He said he hadn't made up his mind.

Judge JACKSON: Well, he said he hoped he wouldn't have to and didn't intend to at the moment but didn't want to relinquish his right of rebuttal.

Chief Justice STEPHENS: Well, the defendants would be entitled to sufficient notice to prepare to meet that kind of

case if the Government should decide to proceed; and before any actual resumption of the trial is reached, I think each side ought to know, as far as they properly can, of the plans of the other with respect to proof so that preparations can be made on both sides.

Mr. BROMLEY, assuming that the case goes forward on your theory, how long do you estimate it would take to put in the defendants' case?

Mr. BROMLEY: Four or five weeks.

Chief Justice STEPHENS: And will the Government expect to have rebuttal, or is that too much to ask?

11721 Mr. STEFFEN: We would have to reserve our rights, your Honor. I might say I think three or four weeks is a very long time if all Mr. Bromley is going to put in evidence on is this very, very fine line concerning pre-concert.

Mr. BROMLEY: Well, that is not all. As I said I am going to call witnesses about Board Survey and about elimination of open edge board and the alleged fixing of resale prices. Those findings have been set aside. We want to have them reinstated.

Chief Justice STEPHENS: We will recess for fifteen minutes.

(Recess, 11:09 a. m. to 11:24 a. m.)

Chief Justice STEPHENS: I suppose the Clerk should call the roll and see that everyone is present or accounted for.

Is everyone represented here this morning, do you know, Mr. Bromley?

Mr. BROMLEY: I think so, your Honor.

Chief Justice STEPHENS: Mr. Johnston is notable, by his absence.

Mr. BROMLEY: Yes, but he has someone here.

Chief Justice STEPHENS: The Court is of the view that there is nothing before it upon which to rule and that nothing could be before it upon which to rule by virtue of a pre-trial conference.

Further discussion such as we have indulged in
11722 this morning might ensue, but still there would be nothing before us upon which to rule, and we think the only way to get a determination as to the meaning of this opinion of the Supreme Court is to get something before us on which to rule.

We entertain, therefore, a motion for summary judgment and request the Government to file a motion for summary

judgment; and we request the defendants to make a proffer of such proof as they think they have a right to make in addition to making such contest as they wish to make on motion for summary judgment.

Then, we will have something before us upon which the Court can rule, as to what the meaning of the Supreme Court opinion is; and from that ruling, possibly further appeal can be taken for clarification to determine what its meaning is with respect to this situation.

I am frank to state, with all proper respect and deference to the higher tribunal, that I have difficulty in reaching a conclusion as to just what the opinion means on many of the matters that have been discussed here this morning, and the differences between counsel already discussed indicate that they are in a similar doubt, and we have nothing before us on which to rule.

I think I reflect the views of my colleagues. We have nothing before us upon which to rule, and the only way we can get a ruling is by having some sort of motion before us.

How soon can you make a motion for summary judgment, Mr. Steffen?

Mr. STEFFEN: May I confer with my colleagues?

Chief Justice STEPHENS: Surely.

Mr. STEFFEN: Your Honor, we are in doubt as to how we could prepare our motion for summary judgment until we had some showing from the defendants as to what they would put in by way of evidence; and if we could have that in writing, then we have our basis for formulating our motion for summary judgment.

Chief Justice STEPHENS: It doesn't seem to us that that is necessary, Mr. Steffen, because it is the Government's contention, as we understand it from your argument this morning, that the licensing system which is established here, admittedly under the license agreements and under the undisputed facts of the case, is a conspiracy in violation of the Sherman Act under the Supreme Court opinion.

Now, if that is true, if you are correct in that, you are entitled to summary judgment without reference to any testimony the defendants will put in.

Mr. STEFFEN: Secondly, your Honor, we might make our motion for summary judgment on the broader basis to the effect that there is no evidence that they could put in—that the evidence as we have it, apart from the *per se* character of the situation as we now have it, would not be adequate for purposes of making a defense, and I have in

11724 mind this situation: If it is Mr. Bromley's purpose to put in evidence concerning what took place during the summer of 1929 when they entered the November licenses, it seems to me that the evidence now in is fairly conclusive and insofar as he has disclosed what he would put in by way of evidence, it would be to call Mr. McLeish or Mr. Avery, or both, and that they would testify concerning what took place during the summer of 1929.

Now, our position or argument has been that the license agreements, the whole body of agreements plus what was done under the agreements, constitute a violation in the light of the Supreme Court's opinion. I do not wish to be understood to say that we are throwing overboard everything that went before. The whole question of pre-concert, we most certainly insist upon that likewise, but what we say is that the Court has gone to the point, as we read it, of saying that the fact that we now have existent, the combination, would alone be enough, but I don't want to be put in the position of not having the advantage of all other facts in the case.

Judge JACKSON: You have the advantage of everything in the case so far.

Chief Justice STEPHENS: The Court is not trying to put you in any position at all. You are at liberty to take any position you want to take. We understand the contention of the Government to be that regardless of what 11725 has gone before, under the opinion of the Supreme Court in the Gypsum case, this licensing system, the very licenses themselves, and the facts and terms thereof—that that is *ipso facto* illegal—and it may well be that that is what the Supreme Court means.

We don't presume to rule on that now one way or the other. I can see, however, that there may be some merit, Mr. Bromley, in Mr. Steffen's suggestion that it would be easier to deal with this situation expeditiously if, before the motion for summary judgment was filed, there was some indication by the defendants of the testimony that they would offer so that we could have an argument on the proffer of testimony as well as upon the summary judgment at the same time.

Possibly that could be arranged by agreement between counsel without disadvantage to either side.

I may say that we have in mind in suggesting this method of procedure not merely the getting of something before the Court on which we can rule and, perhaps as a result of

that, get a definition, a more precise definition, of the opinion for the guidance of counsel and possibly of this Court itself, but also of helping the situation in this jurisdiction with respect to judges, which is desperate. Here I am now, Chief Justice of the United States Court of Appeals. I can't abscond from my duties for six months—and that is what six weeks is likely to mean in this kind of a case, because the Court of Customs and Patent Appeals 11726 judges, if they are to sit at all, would have to sit as we did before, a week or 10 days a month only.

In addition to that, here is the situation in the Court of Customs and Patent Appeals. Judge Ambrose McConnell is ill, has been ill since December, has gone to Cuba for his health, and whether he will be back to work within a few weeks or a few months or ever is not known. Judge Bland has resigned, and his position has not been filled. The appointment has been made, but there is no confirmation, and whether confirmation will take place isn't known.

At the present time, if the two present members of the Court of Customs and Patent Appeals who are members of this District Court were to proceed to take several weeks or several months to try this case, the Court of Customs and Patent Appeals would have to stop operating.

Now, we must do something, if we properly can, with proper protection of the rights of the parties, to expedite these proceedings. Perhaps this may not result in expedition; perhaps our ruling on motion for summary judgment and proffer will be such that there will have to be a trial—perhaps not. But it seems to us we at least ought to try to clarify the meaning of this opinion if we can, for the guidance of all concerned.

Could you make a proffer within the next week, Mr. Bromley, of what you propose to prove if the case goes forward, if the summary judgment is denied?

11727 Mr. BROMLEY: I don't see how I can make an offer of proof until I know the grounds of his motion. I don't care who goes first and takes the burden, but it seems to me I have got to have an indication of what his grounds are, what it is that he relies upon, before I will know what it is that he relies upon, before I will know what it is that I will want to put in by way of defense.

Now, on these motions, it is customary to make the motion, having answering papers, and for the mover to have opportunity to reply. He gets the same chance at my offer of proof, even though it is done in the conventional way.

Chief Justice STEPHENS: I am not sure that I agree with you in that, Mr. Bromley, in this particular situation, because the Supreme Court has ruled—and we are all bound by its ruling—that the Government has made a case. Now, we must respect and carry into effect that ruling with due deference to the higher tribunal.

Now, the burden is upon you to make your case from now on. We are willing to entertain, and do entertain, a motion for summary judgment, based upon the proposition of law that under this opinion on the record as now made, without reference to the proof which might be offered from the other side, the Government is entitled to summary judgment. But if we should deny that, it seems to me that in the interest of expedition we might properly ask you to present a statement of what you expect to prove in order, 11728 partly, to find out how long this case is going to take and what can be done with this extremely awkward if not desperate situation with respect to the constitution of this Court and also to determine whether or not, under the Supreme Court opinion, that proof will avail you anything as a matter of law.

If we thought it wouldn't, what is the use of having a protracted trial?

Now, I can't compel you, of course—and wouldn't presume to—to make this proffer of proof sooner than you can properly do it, and if you insist that you cannot do it coincidentally with the preparation of this motion for summary judgment, of course, the Court won't require you to do so.

I do think, Mr. Steffen, in view of your argument this morning, you ought to make a motion for summary judgment here based upon the facts and evidence and the Supreme Court opinion before the Court now, to determine whether or not, as a matter of law, on what is now before the Court in view of the Supreme Court opinion, you are entitled to a summary judgment in favor of the plaintiff.

If the Court should rule that you are, why, that is the end of the case, unless the defendants then take the case to the Supreme Court to see whether or not we have correctly construed it. If we rule you are not, then we will have to determine what you have to say and whether that will
 11729 avail you anything as a matter of law.

What we are, in effect, asking you to do, which seems to us not unjustifiable in view of the difficulty in which the Court finds itself, is to submit to us the nature of your defense by way of a proffer, and we would,

in effect, thereby, then be ruling on what under old common law practice would be the demurrer to your proposed evidence, and if we held that the demurrer was bad, why, then, you could put in your proof; otherwise, the case would be over then.

It seems to us that some such steps are proper and, indeed, almost necessary under the present situation.

How soon can you prepare and file a motion for summary judgment based upon what is now before the Court, including the Supreme Court opinion, and be ready to argue it?

Mr. STEFFEN: I should say a week or possibly 10 days. This is Tuesday.

Chief Justice STEPHENS: We would like to have you do that just as promptly as you can. If you can do it in a week, it would be much preferable.

Mr. STEFFEN: We will undertake to do it in a week.

Chief Justice STEPHENS: The defendant would have to have some opportunity to prepare to meet it, and we ought to set a time for argument as early as possible in what is left of this month. So, suppose we grant you one week's time.

We will grant you, then a week from today, Mr. Steffen, to file a motion for summary judgment based not
11730 upon the expected proof of the defendants but upon what is before the Court now, including the Supreme Court opinion.

That will help us to test out what is the apparent meaning of the opinion, by some definitive ruling.

Can you, in the mean time—or do you think you cannot properly prepare so that we can have submitted at the same time, within a week, your proffer for the defendants, Mr. Bromley?

Mr. BROMLEY: Well, we will try to do it. I am under a court order taking depositions every day, *Ferguson v. Ford*, which takes all of my time, but we will do our best to get a proffer prepared.

Chief Justice STEPHENS: Very well, and you will want some time after the week to prepare to meet the argument on the summary judgment, to prepare for that. Could we fix some day on which we will reconvene the Court for the argument, both on the proffer and on the motion for summary judgment?

A week from today will be the 15th. Couldn't we have the argument on both of these matters on the 22nd?

Today is the 8th. You, Mr. Steffen, are to have until the 15th to prepare and file and serve upon the defendants' motion for summary judgment; the defendants to have until the same date to prepare and file and serve upon you their proffer of proof. Could we not settle upon the 22nd, two weeks from today, for the argument on both the summary judgment and the proffer?

11731 Mr. STEFFEN: It is pretty hard to get out a brief in that time, your Honor. If we had two weeks—

Chief Justice STEPHENS: You could prepare your brief in typewritten form. You don't have to print the brief.

Mr. STEFFEN: We have always done that, but just the mechanical job—we might do it by the 29th.

Chief Justice STEPHENS: We are pressed to get this matter disposed of if we can reach any disposition of it in that way. I have six or eight weeks of accumulated work in the Court of Appeals yet, and some of it is in Government cases which are extremely pressing—a Securities and Exchange case and a Communications Commission case, which are extremely pressing.

We will set it for the 29th, then.

Judge JACKSON: Would that be all right?

Chief Justice STEPHENS: That is agreeable to both sides.

So, to repeat that, on the 15th the Government's motion for summary judgment will be filed and served upon the defendants, and on the same day the defendants' proffer of proof in its case in defense will be filed and served upon the Government, and on the 29th we will hear argument on both the motion for summary judgment and the proffer at 10 o'clock in this court room.

While I think it is an unnecessary formality, if it is in accordance with the practice of the District Court here, we will sign this order vacating our order dismissing

11732 the Government's case. This is dated May and should be dated June.

This is the original mandate, Mr. Clerk, which I will return to you for the files of the Clerk's office, and the original order of this Court and the original findings of fact.

Mr. Marshal, will you hand those to the Clerk?

Is there anything further, gentlemen, before we recess until the 29th at 10 o'clock in this court room?

(No response.)

Chief Justice STEPHENS: If not, except to say that it is a pleasure to see you all again, we will adjourn until that date.

(Whereupon, at 11:45 a.m., an adjournment was taken until 10:00 a.m., June 29, 1948.)

11735 In the District Court of the United States
For the District of Columbia
Holding a Three Judge Court
Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

— v. —

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; HENRY J. HARTLEY, FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

Court Room,
U. S. Court of Appeals Building,
Washington, D. C.,

Tuesday, June 29, 1948

The above entitled cause came on for oral argument on Plaintiff's Motion for Summary Judgment and Defendants' Offers of Proof at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

11736 APPEARANCES:

On behalf of the plaintiff:

Roscoe T. Steffen, Esq., and Edward Knuff, Esq., Special Assistants to the Attorney General.

On behalf of the defendants:

Bruce Bromley, Esq., Hugh Lynch, Jr., and Murray W. McEniry, Esq., for the defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode.

Nicholas J. Chase, Esq., for the defendants National Gypsum Company and Melvin H. Baker.

Chapton Ogburn, Esq., for the defendant Certain-teed Products Corporation.

Ralph P. Wanlass, Esq., for the defendant The Celotex Corporation.

James O'Donnell, Jr., Esq., for the defendants Newark Plaster Company and Frederick Tomkins.

D. I. Johnston, Esq., for the defendant Samuel M. Gloyd, doing business under the trade name of Texas Cement Plaster Company.

11737

PROCEEDINGS

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11740 Chief Justice STEPHENS: Now, gentlemen, how much time do you wish to argue this motion for summary judgment and this proffer?

Mr. STEFFEN: I should think your Honor, in view
11741 of the day, it would be a little slow, maybe an hour or an hour and a half.

Chief Justice STEPHENS: I think we have all read the briefs of the Government. We haven't had time to read the defendants' briefs as they were just presented. They are not extensive.

Suppose we set an hour and a half on a side tentatively, gentlemen. However, we will not restrict you too seriously as to time.

Will you proceed, Mr. Steffen, taking such time for opening as you wish and leaving such time for closing as you wish.

Mr. Justice Jackson inquires whether or not the offer of proof was formally filed in the clerk's office.

Mr. BROMLEY: Yes, your Honor.

Chief Justice STEPHENS: Was the Celotex offer formally filed? Have you gentlemen examined into that? That is correct, is it not, Mr. Watts?

The CLERK: I have just received the defendants' offer of proof from the Gypsum Company. Absary filed several days ago.

Chief Justice STEPHENS: Who filed several days ago?

The CLERK: Ebsary.

Chief Justice STEPHENS: I haven't seen that. I have had handed to me only Celotex and the defendants' offer, not Ebsary's. The clerk's office should furnish that
11742 to the judges immediately when it is received.

Mr. STEFFEN: We have not seen it either, your Honor.

Chief Justice STEPHENS: You should furnish the Government, if you have extra copies, and each of the judges, the Ebsary offer of proof. When were they received?

The CLERK: I guess it is Celotex I had in mind, Judge.

Mr. CHASE: If your Honors please, as local counsel for National Gypsum Company, I want to advise the Court that Mr. Finck is unable to be here today and expresses his regrets.

In connection with the motion for summary judgment,

which is before the Court, National Gypsum Company joins in opposition to the granting of that motion.

With respect to the proffer of proof, the National Gypsum Company wishes to stand on its answer as drawn, reserving such right as it may have to offer proof in the event there is a resumption of trial.

Chief Justice STEPHENS: Very well. Anything else preliminary?

Mr. O'DONNELL: If your Honor please, in behalf of the individual defendant, Mr. Frederick Tompkins, and the Newark Plaster Company, we wish also to join at this time in the defendants' opposition to motion for summary judgment and also to join with the defendants' offer of proof.

Mr. BROMLEY: May it please the Court, I think perhaps I should call your Honors' attention to the fact 11743 that the offer of proof as filed is signed only by counsel of United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, and, as I understand it, other counsel are orally going to state whether they adopt it as theirs or not.

Judge GARRETT: There was a letter accompanying it, I think.

Mr. BROMLEY: Yes, your Honor.

Chief Justice STEPHENS: Are each of the defendants represented this morning?

United States Gypsum is.

Is Certain-teed represented?

Mr. OGBURN: Yes, your Honor.

Chief Justice STEPHENS: You represent Certain-teed?

What is your position?

Mr. OGBURN: We join in this proffer of proof.

Chief Justice STEPHENS: Made by the defendants U. S. Gypsum Company, *et al*; and you also resist the motion for summary judgment?

Mr. OGBURN: Yes, sir.

Chief Justice STEPHENS: And who represents Celotex?

Mr. WANLASS: If your Honor please, The Celotex Corporation joins in the opposition to the motion for summary judgment and adopts the general proffer of proof on behalf of defendants, which we have supplemented by an individual proffer on behalf of Celotex.

11744 Chief Justice STEPHENS: Ebsary?

Is Ebsary represented?

(No response.)

Mr. KNUFF: They don't have local counsel.

Chief Justice STEPHENS: J. S. Rippey, Frederick G. Ebsary. They are not present this morning?

Mr. BROMLEY: He is not here, sir.

Chief Justice STEPHENS: Newark?

Mr. O'DONNELL: Your Honor, I made a statement on behalf of Newark.

Chief Justice STEPHENS: Oh, yes.

Mr. Johnston, we note your presence.

Mr. JOHNSTON: If your Honors please, we join U. S. Gypsum in resisting the motion and join in the offer of proof.

Chief Justice STEPHENS: The individual defendant Avery is represented, of Course. Oliver K. Knode; Melvin H. Baker, he was also United States Gypsum Company, was he not?

Mr. BROMLEY: Mr. Baker was National.

Chief Justice STEPHENS: National.

The statement has just been made for National.

Mr. BROMLEY: Yes, sir.

Chief Justice STEPHENS: Dahlberg is out of the case.

Hartley. Who represents Hartley individually?

Mr. OGBURN: Hartley was represented, your Honor, by

Mr. Adams. He has not been an officer for many, 11745 many years, I think, of Certain-teed. I don't know whether Mr. Adams still represents them or not.

Chief Justice STEPHENS: And Frederick G. Ebsary is absent.

Who represents the individual Frederick Tompkins?

Mr. O'DONNELL: I do, your Honor.

Chief Justice STEPHENS: You may proceed, Mr. Steffen.

Opening Argument on Behalf of the Plaintiff by Mr. Steffen

Mr. STEFFEN: This is an argument, your Honor, upon the plaintiff's motion for summary judgment, which was duly filed on the 15th of the month in accordance with the Court's direction.

Upon such an argument we assume that the rule as stated in the Miller case in this jurisdiction would apply in determining what is necessary to make out a defense under summary judgment, and that is that summary judgment will be granted only when it appears that there is no genuine issue as to any material fact.

The citation on page 23 is probably as good a citation or as good a statement of the rule as you will find. There the court says:

11746 "It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force."

It will be our purpose to examine the defendants' proffer of proof in this case in the light of that statement, and I think we may show your Honors either that the evidence is too incredible to be believed or—and this is by all odds the largest category—that conceding its truth, it is without legal probative force.

Chief Justice STEPHENS: What page did you say that is?

Mr. STEFFEN: That is on page 23 of the Government's brief, and that, I think, is a court statement as to the purport of Rule 56 of the Federal Rules under which we are proceeding with our motion for summary judgment.

That brings me to the substantive argument.

If your Honors please, I should like to argue first the law of the case as we see it, and secondly, to take up each of the offers of proof that the defendants have made and to determine whether they fit or don't fit into this picture.

Now, the law of the case, as we said last June 8, informally, I think has been said by the United States Supreme Court in its statements in the Gypsum case, and in particular I want to refer your Honors to the language on pages 34 and 35 of the slip opinion.

11747 I call your Honors' attention particularly to the language at the top of page 35, about 5 lines down.

Chief Judge STEPHENS: Of the Supreme Court opinion?

Mr. STEFFEN: Of the slip opinion, yes, your Honor.

"It says:

"Even in the absence of the specific abuses in this case, which fall within the traditional prohibitions of the Sherman Act, it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices."

That, we take it, is perhaps the best summary in the opinion of the law of the case and it, if I may so state, seems to us to say substantially what we argued when the case was here before.

We take that to say that if we can show that the defendants, constituting all former competitors in an entire industry, acted under patent licenses to organize the industry and stabilize prices, that the combination is unlawful.

11748 Now, the first argument that would meet that point is that the General Electric case gives protection to the defendants for what they have done, and we have, in our brief, taken that up on page 24. I would refer your Honors particularly now to the language of Mr. Justice Reed on page 34 at the foot of the page. He says:

"The General Electric case affords no cloak for the course of conduct revealed in the voluminous record in this case."

Then, this next language is important:

"That case gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized."

Then, to carry on, the last sentence on page 35 seems to us to hit the other idea expressed in the General Electric case. That is, that price control would be permitted where it was normally and reasonably adapted to secure pecuniary reward to the patentee for his patent.

The language here is just as cold as it can be, and it says:

11749 "The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly."

That states our basic proposition, that what we have to establish here beyond any reasonable doubt, or at least without any genuine issue as to a material fact, is that there was a combination of erstwhile competitors throughout the gypsum industry; that they did fix prices.

I think for purposes of present argument, although we do not waive the point, that many of the abuses such as the court refers to in this portion of its opinion, such as controlling plaster prices, perhaps controlling manufacturing distributors, fixing the size of truckloads, the amount of dunnage, eliminating jobbers—all of those abuses, if proven to have been done by concerted action would normally constitute a violation of the Sherman Act, can for purposes of this argument be laid to one side, and we can look simply to whether or not the defendants combined under patent

licenses, being erstwhile competitors covering an entire industry, and fixed prices.

Judge GARRETT: The Supreme Court said that, did it?

Mr. STEFFEN: That is as I read it, your Honor.

Judge GARRETT: In other words, all these matters of damage and freights, and all of that, are not necessary
11750 to the broad decision that the court was making. Is that the way you interpret it?

Mr. STEFFEN: I would say this: For purposes of a motion for summary judgment and for purposes of the Supreme Court's opinion, it isn't essential to show all of these violations. If you have shown price control alone, you have a case.

Our purpose, therefore, is to clear this as nearly as we can to the essential point in issue—which we think is not in issue, and ask your Honors for summary judgment on that basis.

Then, when it comes to the matter of formulating the decree, if you should give us summary judgment, then many of these matters will come up. I think you will find that most of them will be rather easily handled upon the decree.

But for purposes of judgment, either for violation of section 1—that is, if there is a violation of section 1, combination in restraint of trade—we can center this argument on price. They did fix prices. There is no question on the Supreme Court decision that if you did establish price control, that it is *per se* unlawful. We would like for purposes of this argument to center on that one point.

Secondly, as you have noted in our third point of our brief, if you find an industry under the control of a group who have the power either to exclude competitors or to charge monopoly prices, you have a monopoly. That

11751 would be a violation of section 2. I will take that up when I come to it, but I want to get clear that we are moving now on both section 1 and section 2. One is a conspiracy or combination in restraint of trade, and the other is a monopoly which is tested by whether they have the power to exclude competitors or to fix monopoly prices.

Now, we have cited here in the footnote on page 24 the colloquy that took place between Mr. Bromley on the one hand and Justice Frankfurter on the other in the Supreme Court argument, which I think is rather illuminating. They got to the question there of whether a plurality of licenses might be a legitimate exercise of the right of a patent holder. If you read the discussion, it comes down to Mr. Justice Frankfurter's statement that:

"I do not think logic, abstract logic, is going to solve this kind of a problem."

In other words, as we read the Supreme Court's holding, which was unanimous, they looked at the substance of the thing. They see here what is admitted in this case without any question, they see here a combination of all of the gypsum manufacturers in the country East of the Rocky Mountains, they see that since November, 1929, they have fixed prices without any question at all, that they have done a number of other things such as I have read from Mr.

Justice Reed's opinion: the complete regimentation 11752 of the industry, the production of competitive unpatented products suppressed, a class of distributors squeezed out and numerous other things, and you see, therefore, the fact that what you have here is a group of people in charge of an industry who have for nearly 20 years or at least since November, 1929, had absolute control of an industry.

That is substantial, and what they are looking at is really what the Sherman Act is directed to prevent. They want to get rid of combinations which do control and restrain commerce. So my first point, therefore, is that what we have to show is a combination of erstwhile competitors in charge of an industry who have used the patent license agreements for purposes of fixing prices.

My sub-point is that the General Electric case gives no support for that form of organization. In other words, we can for purposes of further discussion lay the General Electric case to one side. It has no application to the facts of this case.

Another point which we make—Perhaps I should make that point a little more clear because we have to get rid of that. If you will note on Page 26, I refer to what took place in the opinion of the court in the Line Material case.

Chief Justice STEPHENS: Page 26 of your brief?

Mr. STEFFEN: Yes, your Honor.

In the Line Material case, they referred to their 11753 decision, and the court there says in effect, (Mr.

Justice Reed speaking), that the court is divided on whether the General Electric case should be overruled or not and that it would be unwise for him to state very broadly what it now stands for, but he says that it, at least, continues as a precedent—continues as a precedent—in a situation where a conspiracy to restrain trade or an effort to monopolize is not involved. He goes on to say:

"* * * a patentee may license another to make and vend the patented device with a provision that the licensee's sale price shall be fixed."

In other words, as we read Mr. Justice Reed's language in the Line Material case, he very explicitly says that the G. E. case must be limited to practically the situation between licensor and licensee and that where there is no charge of a combination in restraint of trade or no charge of a monopoly—beyond that, he says it isn't a precedent.

Judge GARRETT: Mr. Justice Douglas, I believe it was, put in a pretty strong concurring opinion there.

Mr. STEFFEN: Yes, your Honor.

Judge GARRETT: In which I believe he used the expression "I would have done with the General Electric case".

Mr. STEFFEN: Yes.

Judge JACKSON: That would clear a good deal of 11754 the atmosphere if they had done it, too.

Mr. STEFFEN: We wouldn't have to argue so much. I think you can treat it as substantially done. As you perceive they haven't overruled it, but what they have said is that it is on a very, very limited footing.

I want to refer, while we have this up, to the Paramount case. In the Paramount case, which was decided after both the Line Material and the Gypsum case, the same thing came up. The charge there in the Paramount case was that there was a combination among the producers of films, and they made the contention that they had a copyright and that, having a copyright, they could therefore fix prices. These would be admission prices to theatres, using the General Electric case as their authority.

Over here on page 39 of our brief, I quote from the Paramount case, and there the court says:

"We start, of course, from the premise that as far as the Sherman Act is concerned, a price fixing combination is illegal *per se*. We recently held in *United States v. United States Gypsum Company*"—referring now to this case—"that even patentees could not regiment an entire industry by licenses containing price-fixing agreements."

That is what the court says in the Paramount case, "that even patentees could not regiment an entire in- 11755 dustry by licenses containing price fixing agreements."

Now, that is pretty explicit language.

To continue:

"What was said there is adequate to bar defendants, through their horizontal conspiracy, from fixing prices for the exhibition of films in the movie industry. Certainly the rights of the copyright owner are no greater than those of the patentee."

Then, he goes on a little later in the opinion:

"We stated in *United States v. United States Gypsum Company* that 'The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly'."

That is that same sentence, and it says that if you find a situation where they have fixed prices throughout an industry, and, of course, regimented it in all other respects such as fixing truckloads and delivery areas and all the rest of the things, that the rewards you get are not normally and reasonably adapted.

I might say to your Honors that in our brief before the Supreme Court we listed each of those items and asked the Court to tell us whether this, that, or the other was normally and reasonably adapted. This sentence 11756 just says that none of them are, that where you have an entire industry together, that the awards are not normally and reasonably adapted, without getting down to where this, that, or the other thing might have been reasonable under some circumstances.

Now, the opinion continues:-

"The same is true of the awards of the copyright owners and their licensees in the present case. For here too the licenses are but a part of the general plan to suppress competition."

Note that language.

"The case where a distributor fixes admission prices to be charged by a single independent exhibitor, no other licensees or exhibitors being in contemplation, seems to be wholly academic . . ."

Those were the words, by the way, of Judge Hand in the lower court when he was distinguishing the General Electric case. He said the General Electric case applied in his opinion only to the transaction between licensor and licensee and that where you have an industry-wide agreement it does not apply. Here is the Supreme Court saying that that situation is wholly academic, and it certainly is

on the facts of this case for the reason that we have here admittedly all of the manufacturers of gypsum board in the area East of the Rocky Mountains, so that there is no question that this is much beyond a single licensor 11757 or single licensee thing. This is a case where we charged a combination throughout, and there, as Mr. Justice Reed says, the G. E. case doesn't apply, doesn't continue as a precedent where you have charged a conspiracy or monopoly throughout an industry.

Well, now, if that will dispose of the General Electric case, we are then thrown back simply to the question of whether these defendants had associated together as a combination, whether they were erstwhile competitors, whether they have fixed prices, and whether that is so clear in the record that there is no genuine issue as to any material facts.

It is my purpose now to look to see whether we have those elements so clearly in the record that there is really no issue as to any material fact.

On page 27 we itemize most of the things that are admitted which are essential. There is no question in the case but what we have all the manufacturers in the area covered. There is no question in the case that they were former competitors. In fact, the record is clear, and I think the defendants offered to prove again, that there was a price war prior to the license agreements in 1929. So that, there was competition; we have all the manufacturers, and they were all the former competitors, and there is no question that they all took out licenses and there is no question whatever but what every license from first to last, as Mr. Bromley told the court, contained a price fixing agreement. Mr. Avery was very in- 11758 sistent upon that. There is no question, furthermore, but that they did fix prices.

If you will note, Mr. Bromley in his opening statement, as we quote on page 27 here, said:

"We don't take the position that we didn't fix prices. Of course we did, we fixed prices of our competitors."

That is clear. So what have you got?

You have got a combination of all competitors in an industry covering the whole area, and you have got them fixing prices.

As I say, laying aside for one moment the matter of all the other abuses, price fixing is, after all, the chief vice

that the court has been inveighing against for the last several years.

Now, the question next then is to see whether the defendants have acted in concert and the question next beyond that is to determine the point of time at which they acted in concert. We have to show that the defendants, acting in concert, acted to restrain commerce in the area East of the Rocky Mountains.

Now, on page 29 we set out the test, the test of when you have a conspiracy or when there is concerted action. That is probably best shown in the Interstate Circuit case and the Masonite cases. They are referred to consistently by the Supreme Court in all their later opinions, and 11759 they are no way shaken as authorities.

Therefore, I would read you what the court said, reading there in the middle of page 29 of our brief:

"Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequences of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

Chief Justice STEPHENS: Let me have that again.

Mr. STEFFEN: Page 29, the last part of the middle paragraph.

Chief Justice STEPHENS: Beginning, "Acceptance by competitors"?

Mr. STEFFEN: Yes, your Honor.

Judge JACKSON: It might be said then that "by their fruits ye shall know them."

Mr. STEFFEN: Yes, your Honor, decidedly so.

I am getting now, your Honors, to the point we reached in our discussion or hearing on June 8, in which Mr. Bromley said that his position constitutes a very fine line. As I understand his position as then stated, it was that although we could show all of these other things, unless we could show that they not only intended but actually understood and agreed in advance of signing the licenses that they were going to do the various things such as price 11760 fixing, eliminating jobbers, and so on, that we couldn't have made a case. I am reading now from

the test as laid down by the Supreme Court as to when you have a conspiracy. I want to make it so very clear that you don't have to have a preliminary agreement. As Mr. Justice Jackson says, you know them by their fruits, and if you find them in a combination and if you find them

actually fixing prices and it covers an entire industry and they were former competitors and even though they have used the patent licenses which would normally be a lawful step, if you find them in a combination, that is unlawful.

The point of time in which the industry must have given its adherence to that way of doing business or that plan, or scheme, or whatever you wish to call it, is not material. In order to violate the Sherman Act, you don't have to sit down first and say, "Now we are going to take out a license to do this and fix prices." If you do fix prices, then the court is not going to listen when you say, "Ah, but we didn't intend to do that. All we did was murder the man—we didn't intend to do it."

Let's take a look again at that statement:

"Acceptance by competitors"—these are clearly competitors—"without previous agreement"—that practically answers the question of whether or not we have a previous agreement—"of an invitation to participate in a plan"—and the plan, as we stated 11761 here, is what they did, that they organized and regimented the industry—"the necessary consequences of which, if carried out, is restraint of interstate commerce"—and here they have carried it out and they have fixed prices ("Of course we have fixed prices", as Mr. Bromley says)—"is sufficient to establish an unlawful conspiracy under the Sherman Act."

It will be noted that in the Interstate Circuit case the court did not specify that the adherence to the plan must be at any given time. Now, to make this very tight, look at what they did in the Masonite case. In the Masonite case, and I will quote from the excerpt on the lower part of the page, the lower court found expressly that:

"... in negotiating and entering into the first agreements, each appellee, other than Masonite, acted independently of the others,"—

You see, the Masonite case was very similar to this case. In that case, Masonite had a patent, and Masonite entered into a series of contracts with other manufacturers and these contracts gave those manufacturers *del credere* agencies to sell the patented article. Each of those contracts was lawful, looked at alone. The question was: Well, when did they first learn that they were in this agreement whereby the whole cardboard industry was stabilized?

11762 The lower court found that they acted independ-

ently, that Masonite licensed one and then they licensed another.

—"negotiated only with Masonite,"—

that is much different from this case, each of the licensees negotiated directly and solely with Masonite, that they

—"desired the agreement regardless of the action that might be taken by any of the others,"—

that is, we have some testimony here that they wanted the U. S. G. patents even though nobody else took out licenses, and the court says that:

—"regardless of the action that might be taken by any of the others,"—

and in this case we have a most favored nation clause in the license agreements where they did require in effect that if you do license anybody else, it must be on the same terms—

—"did not require as a condition of its acceptance that Masonite make such an agreement with any of the others, and had no discussions with any of the others."

11763 This case is just full of discussions on the part of all licensees at various meetings, and it is in the record admitted that there were meetings all during the summer of 1929, a meeting in May, May 23rd, and many meetings subsequently are admitted, and here the lower court found there were no discussions. Now, look at what the Supreme Court did with that. It says:

"It is not clear at which precise point of time each appellee became aware of the fact that its contract was not an isolated transaction but part of a larger arrangement. But it is clear that, as the arrangement continued, each became familiar with purpose and scope. Here, as in Interstate Circuit, * * * 'It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it.' The circumstances surrounding the making of the 1936 agreements and the joinder in 1937 of the two other companies leave no room for doubt that all had an awareness of the general scope and purpose of the undertaking. As this Court stated in the Interstate Circuit case: 'It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators * * * Acceptance by competitors, without

11764

previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.' "

Judge GARRETT: May I ask you there about your interpretation of that last paragraph beginning with "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action"? I suppose there must have been conspiracy between at least two individuals.

Mr. STEFFEN: Yes, your Honor.

Judge GARRETT: And then if others entered thereafter under the same terms, it would make them conspirators? How do you understand that language?

Mr. STEFFEN: I read it in the context of the case, and in the context of the case you have Masonite with a patent, and you have the different manufacturers of cardboard with competitors and Masonite said to Manufacturer A, "We will make you a *del credere* agency and let you sell."

Then Masonite said to B, we will make you a *del credere* agent, and then they said to C the same thing, and then they woke up one time with all of them aware, as the court says, of the fact that they were in a plan whereby Masonite was fixing prices throughout the industry.

11765 The court said it doesn't make any difference whether they have preliminary conversations or whether they acted independently if at some time they all said, "Well, here we are; we are now fixing prices throughout the industry; we are now in a combination or conspiracy."

So the point I make is that it isn't that you have to have a pre-concert or agreement sometime before you enter the agreement, it is what you are going to do if you all get in together and are restraining commerce and trade without any patent protection, as in this case, and thereby having an illegal and unlawful combination and conspiracy.

Judge GARRETT: I am thinking particularly of the meaning of the word "conspiracy" as it is used in the Act.

Mr. STEFFEN: These are the two cases that construe it most authoritatively, I believe, and they say that for purposes of showing conspiracy all you have to show is adherence to a common plan, a common course of dealing or course of action with knowledge that the others are doing the same thing. When you get all the manufacturers

together, each of them knowing that the other is guiding his business according to the same plan—or, in other words, in this case they are all fixing prices as U. S. G. lays them down—you have a combination or conspiracy, which this case holds is unlawful.

The point I want to make is it doesn't make any difference when that comes, whether before they took out those licenses or agreements they intended to do this, or whether they first become aware—as the plan progresses, and when they do so become aware, from then on you have concerted action, which is what the Sherman Act is directed against, concerted action on the part of erstwhile competitors according to a common plan or course of dealing, the necessary effect of which is to restrain commerce.

Practically everything in that formula is, I think, in this case clear beyond any doubt. These two decisions state the law of the case, I think, without any doubt at all.

Is that clear, your Honor?

Judge GARRETT: Yes, I understand your position.

Mr. STEFFEN: Well, the point that I should talk to is whether or not these defendants at anytime learned that there were other defendants in the industry all guiding themselves by the U. S. G. bulletins.

In other words, when do we find concerted action for the purpose of restraining commerce or fixing prices?

That, I think, is clear without any question at all.

One of the points that we refer your Honors to on page 30 is the policing matter. U. S. G., as you will recall, formed Board Survey to police licenses, and Mr. Bromley, I think, stated in his opening statement that:

“Of course, it was policing, of course it was trying to keep the licensees in line, but trying to keep them in line only under the licenses . . .”

We take that as more or less a complete admission that all the licensees were taking part in the policing. They knew that others were associated with them and that the purpose was either to carry out the licenses or really to fix prices and restrain commerce.

Then, we have in this meeting of October 17, 1932, you will recall Mr. Lenci's testimony here in which he quoted Mr. MacLeish that,

“if the situation did not improve there were only three things to do, either cancel the licenses; or for U. S. G. to institute damage suits against the licensees; or to eliminate the price control feature from the licenses.”

Now, at the conclusion of that day's testimony, there was a colloquy between Justice Stephens and Mr. Bromley in which it is pretty clear—this is on page 31 of our brief—in which it is pretty clear that Mr. Bromley agrees that did take place, that all of the licensees with the licensor were present, they went over the matter of whether they were or were not going to have price control, and they decided in effect that they would have price control because price control continued on afterward. There is no question but what it did continue on after.

There we would say if all other evidence failed,
11768 there would be a point of time when the entire industry in the language of the Supreme Court, "became familiar with the purpose and scope of the plan". I am reading from the court's opinion in the Masonite case, but it is clear, as the court there said:

"that as the arrangement continued, each became familiar with its purpose and scope."

We have agreed that the purpose and scope was to fix prices throughout the industry and that they had no exemption by virtue of the General Electric case. There you have all the manufacturers of gypsum board in the United States East of the Rocky Mountains familiar with the purpose and scope of the plan to fix prices. In fact, they had an opportunity to get out at that time because U. S. G. said "Go along or we will sue you or cancel the agreement," and they chose to go along.

There you have a clear case of concerted action on the part of all erstwhile competitors to fix prices throughout the industry.

Now, we also have in the meeting of May 23, 1929—that was the Chicago meeting at the Palmer House where Mr. Avery admittedly said to his licensees:

"We have a 'foam' application, and we would like to license you."

He offered at that time to license the industry. There is no question but what that was true. The defendants in their proffer offer to prove it again.

11769 On page 12 of their proffer, item 31 says:

"On May 23, 1929, U.S.G. disclosed to its licensees the existence of the new 'bubble' invention, which was a method of making a lighter and cheaper gypsum board by introducing soap foam in place of sawdust, for which an application for letters patent had been filed * * * U.S.G. offered a license under the new 'bub-

ble' invention to any of its licensees who might be interested in taking it."

Over in the Supreme Court, Mr. Justice Black asked Mr. Bromley:

"What happened after the expiration of the patent?"

Mr. Bromley answers:

"After the expiration of the patent, Mr. Avery called these licensees together and said, 'Now, I have an entirely new development, the Roos foam or bubble board invention. I want you to look at it. I offer it to you. You can have it if you want it.'"

That statement makes it clear, I should hope, beyond any question at all for purposes of this case, that Mr. Avery got all his licensees together and he offered them a license under the "foam" application.

Of course, as you know, those licensees were subsequently signed, in November of 1929, and you know
11770 from Mr. Bromley's admission throughout this case, that those licenses provided for price control because Mr. Avery insisted from first to last that there must be price control.

So, without laboring the argument any further, it would seem that we have a clear-cut case of these defendants going into a plan, these defendants, being erstwhile competitors, going into a plan to license the entire industry to fix prices and each knowing that the others were going into the plan—it is not necessary that there be an agreement to go into the plan. If "A" sees "B" going in, "B" sees "C" going in and "C" sees "D" going in, and they all go in knowing the others are going in, you have a combination or conspiracy. You don't have to say, "Let's sit down and agree that we are going to do what we do." Nor do you have to show intent; you don't have to show that they intended to do what they did.

Judge JACKSON: They evidently relied upon the General Electric case when all this was done.

Mr. STEFFEN: Yes, and that accounts for most of the things they did.

Judge JACKSON: That is very obvious, I think.

Mr. STEFFEN: Let me buttress this argument a little bit better. On page 32 we have a colloquy between Mr. Bromley and Mr. Justice Reed before the Supreme Court, and I read this to mean Mr. Justice Reed was putting his figure on this very question we are talking about
11771 here. He wanted to know when did these people get

together, according to the record. The following colloquy occurred:

"Justice REED: What I am interested in knowing is whether the licensee, the middle licensee, with Blagden on one side and the last licensee on the other, knew of the other licensees?"

He wanted to find out what did they know. To continue:

"Mr. BROMLEY: I think all, of course, as they took licenses, knew of the existing licenses.

"Justice REED: Was there any provision that this was a standard license, or were there more favorable terms?

"Mr. BROMLEY: Yes, sir, there was a most favored nation clause.

"Justice REED: Do you recall what that is or where that is?

"Mr. BROMLEY: They can find it in a minute * * *

"Justice REED: Also if there is such favored nation clause, each of them must know that it is participating in the general plan.

"Mr. BROMLEY: Yes, sir * * *"

Now, if I stop there, that is the complete admission on the part of Mr. Bromley, as I see it, before the Supreme Court, that they did know that they were participating in a general plan before they signed the licenses, which established that they probably knew it—they definitely knew it even after they signed the license—but here is a flat admission that they knew it even before they signed the licenses.

11772 11773 Now, Mr. Bromley's argument carries on:

"but if the end result is legal how can their knowledge render it illegal in the end result; even with a multiplicity of licenses it is legal, and I do not understand that there is anything in Masonite which is contrary because the agreements in Masonite, contrary to the agreements here, were unlawful."

Now, Mr. Bromley is making a legal argument there to the Supreme Court. He admitted the proposition, first, that they did know that they were going into the licenses. He is now trying to say that although they knew that, that that was perfectly lawful. That was his opinion. The Supreme Court held it was not perfectly lawful and that the General Electric case did not apply.

Therefore, his argument on the law can't stand up in view of the Supreme Court's opinion.

I want to make one more point. He says:

"As I understand the Masonite agreements were unlawful and that that distinguishes the Masonite situation from this situation."

The Masonite licenses or agreements between Masonite and each of the other manufacturers created a *del credere* relation between Masonite and the other manufacturers, and the Supreme Court, Mr. Justice Douglas writing that opinion, said:

"We assume those agreements are lawful."

11774 In other words, each of the agreements between Masonite and each of the others were lawful agreements, and that the difficulty there, as here, was that the sum total of the thing was unlawful. It was the concerted action using lawful license agreements, in this case, and using lawful *del credere* agency agreements in that case, to build up a combination or concert which had the effect of restraining trade.

Chief Justice STEPHENS: This question is perhaps academic now, perhaps it is a mere matter of intellectual curiosity to ask it, although perhaps it might serve to illuminate the question which you commented upon:

I thought in the Masonite case (reading from page 4123 of the transcript of record):

"The Court, treating the 'agencies' for the purpose of the decision as *bona fide del credere* agencies, nevertheless held that the form in which the parties chose to cast the transaction was not to govern and that the 'agency' arrangements in reality presented a Bloomer vs. McQuewan, Adams vs. Burke, Hobbie vs. Jennison pattern wherein when a patented product 'passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and it is no longer under the protection of the Act of Congress.'"

I thought, therefore, that on the whole of the
11775 Masonite case, as we said in our opinion in the topic in which we discussed the authorities, that while it is true Mr. Justice Douglas said he would assume the legality of the *del credere* arrangement, ultimately on the whole of the opinion he didn't and couldn't have meant that because he said that you had an Adams vs. Burke, Hobbie vs. Jennison, Bloomer vs. McQuewan situation; and that is the situation wherein the title to the patented product having passed to a purchaser rather than an agent, the control over it and over pricing it and over its distribution is lost to the patentee.

It was ultimately held in the Masonite case that you did have a situation where, in respect to each of the assumed *del credere* agents, there was an actual passing of title to the patented product, so that there really wasn't a *del credere* agency relationship. There were no agency relationships at all. There was the relation of purchaser and seller.

If that is so, it puzzles me greatly to understand the opinion of the Supreme Court—and perhaps, as I say this is academic, but perhaps it might help to eliminate the argument. If that is so, I am still puzzled as to what the Supreme Court means—and we have to try to find out what it means to reach a decision on this motion—if it holds that:

The General Electric case will permit a single patent license with a price-fixing provision, but no 11776 more. Because a single patent licensing agreement with a price-fixing provision involves all the elements of action in concert which are involved when you have more than one. It involves necessarily a discussion of the terms and an agreement upon the terms and an agreement to fix prices by both the patentee and the licensee.

Aren't you, therefore, really forced into the position that the General Electric case is overruled?

Mr. STEFFEN: Your Honor, we would be very glad to take that position. I think logically you are right, and I think logically what a supreme court may do some day is to say it is overruled, but right now we are in that intermediate position which isn't entirely logical, as your Honor quite properly pointed out, where it continues as precedent only in the single licensee-licensor situation.

Where there is a charge of conspiracy and particularly where it gets to the point of an industry-wide license agreement, where the court says flatly that the rewards go beyond anything that the patentee is entitled to normally and reasonably, then the G. E. case doesn't apply; but we would be very glad to take the position that even as between licensor and licensee where there is price control, that it should be deemed to be overruled. But it hasn't been so overruled yet.

Now, I make one other argument.

Chief Justice STEPHENS: You have quite a little 11777 time. You started at 10:25, and it is now 11:15.

Therefore, you have ten minutes of your first hour, and you are allowed an hour and a half. We will not be too strict in any event. We want to hear you, all parties, fully.

Mr. STEFFEN: I would like to make the argument now, which is Argument E on page 36.

Chief Justice STEPHENS: Since I have interrupted you, you might clear up another point in my mind.

What do you mean when you say that if the Court should reach the conclusion which you urge it to reach,—that there was action in concert, admittedly under the pleadings and statements and admissions of counsel, to enter into this group of licenses for the purpose of stabilizing prices—that the other issues in the case (by which I assume you refer to the agreement to fix prices at high and arbitrary levels, the agreement to fix prices on unpatented materials, the agreement to eliminate jobbers, the agreement to eliminate unpatented open-edged board, and the agreement to fix the resale price of manufacturing distributors as charged) can easily be taken care of in a decree?

How can we take care of those issues in a decree unless we reach also the conclusion—I mean without a hearing on those issues—unless we reach also the conclusion that under the Supreme Court opinion the Supreme Court has said that no evidence will overthrow anything which the 11778 Government has shown with respect to those issues?

Mr. STEFFEN: My position on that, your Honor, is that for purposes of this argument the center of the thing is price control. If the Court should give judgment for us in general—that is, judgment under Section 1, based upon a showing without any dispute as to price control—then you come to the matter of a decree and you enter a decree, let us assume, forbidding any price control.

The result of that would be substantially to avoid the jobber situation. We would expect, however, probably also a decree saying that the defendants shall not concertedly refuse to sell to jobbers at any specified price. Now, when we come to that point I don't think Mr. Bromley will raise much of an argument because there isn't any question but what jobbers are out and what we are asking is that they shall refrain from concertedly refusing to sell to jobbers at anything other than the dealers price, leaving it open to any manufacturer to do just as he sees fit.

I should think he would be willing to consent to such a provision in the ultimate decree. Therefore, it isn't essential that we get into a long dispute and a lot of evidence on whether they have or haven't been eliminated. There is enough showing, certainly, that they have been eliminated

to justify the Court in enforcing its decree based upon price control along to say, "and, moreover, you should
11779 not gang up against the jobbers"—just to implement the broader decree.

This point "E", your Honor, if I may refer to that, gives another argument why the Line Material case is not only not an authority against the Gypsum case—in other words, it didn't overrule the Gypsum case—but I think it brings out into the open another set of facts which distinguishes this case from the General Electric case and which would therefore, again justify the Court, finding all of the other necessary elements, to give judgment for the plaintiff.

I don't know that I need in my time to stress that. It is fairly well developed in the brief.

Chief Justice STEPHENS: Where does your point "E" start?

Mr. STEFFEN: It starts on page 36 and continues on for two and a half pages to 38.

Chief Justice STEPHENS: Oh, yes.

Mr. STEFFEN: Briefly what the court had in the Line Material case was two patents, a dominant and a subservient patent. There were two manufacturers in the case to start with. The Southern people owned the Lemmon patent, which is the dominant patent on the drop-out fuse, and the Line Material people owned the subservient Schultz patent, which was also on the drop-out fuse. Obviously; neither
11780 could sell—of course, the dominant patented article could be sold, but the subservient patented article couldn't be sold unless they made their peace with the holder of the dominant patent.

In the arrangement the Southern people licensed Line to use the dominant patent, the Lemmon patent, with a cross-license back, and gave Line also the right to license the rest of the industry with price control, and in the outcome you had Line Material, much as Gypsum in this case, licensing the entire industry to make drop-out fuses.

The question then was whether that was a combination in restraint of trade in violation of Section 1. As Mr. Bromley pointed out, we contend that the court could readily have decided that case on substantially the reasoning that they did in this case. There you have a drop-out fuse industry, all of them are in the price-fixing agreement, and the question would be whether or not that would be unlawful. The court held that it was unlawful, but in the course of its opinion, instead of expressing as they did in the Gypsum

case the combination of manufacturers to regiment the industry and therefore getting it out of the G. E. case, they stressed the fact that here were two patents, that neither patent holder alone could have licensed and price-fixed his article, that when they put the two patents together and then licensed the industry, that the combination and the price fixing based on a combination went beyond anything that the court had theretofore held.

11781 The language of the court is fairly clear. On page 37 it says:

"While the General Electric case holds that a patentee may, under certain conditions, lawfully control the price the licensee of his several patents may charge for the patented device, no case of this court has construed the patent and anti-monopoly statutes to permit separate owners of separate patents by cross-licenses or other arrangements to fix the prices to be charged by them and their licensees for their respective products."

Chief Justice STEPHENS: You are reading from page 37 of your own brief?

Mr. STEFFEN: Yes, the top of the page, Mr. Justice Reed's opinion from the Line Material case.

Chief Justice STEPHENS: I see, thank you.

Mr. STEFFEN: You see, what he is pointing out there is a further exception to the General Electric case is where you have two patents that are put in the hands of one patent holder and then he licenses the industry. He says no case has gone that far, that the General Electric case doesn't go that far.

Now, in this case here we have in the summer of 1929 admittedly the "starch" patent and the "foam" application which subsequently became the "Roos Foam" patent.

11782 As you can see by reading the patents in the complaint, they both were patents to make a porous or cellular board. They both were to make a lightweight board.

The "starch" patent has a patentable feature, the fact that it made the paper bond adhere better to the cementitious core and, of course, the "foam" patent had as its patentable feature a multiplicity of cells, making it a porous board.

Now, in the summer of 1929 when they were negotiating the present licenses, they first proceeded under the "foam" applications. Then when Universal said, "We have got a patent covering the use of starch, making a lightweight

board", you then see them bringing the two together, instead of Universal licensing U. S. G. to relicense the industry, as they did in Line, Universal sold to U. S. G. It was a different arrangement, reaching the same result.

In other words, let's take the general language of Mr. Justice Reed and I will read now on page 37 from the second quotation:

"Where two or more patentees with competitive"—and the "starch" and "foam" patents were certainly competitive—

"non-infringing patents combine them"—that was done—

"and fix prices on all devices produced under any of the patents, competition is impeded to a greater degree than where a single patentee fixes prices for 11783 his licensees."

We have never decided that the G. E. case covers that situation but, of course, the court in the Line Material case had to go on and find that all of the licensees knew each of them was in the agreement and that the purpose was to fix prices, that they did fix prices just as they have here; but the court made a further argument why the General Electric case did not apply.

Now, that brings me to the matter of monopoly. I think our case here on monopoly is even clearer than on conspiracy. In other words, that there is a violation of Section 2 and that there is no genuine issue as to any material fact concerning the existence of a monopoly.

In the first place, of course, you lay aside the General Electric case because they have gone beyond anything that was permitted under the General Electric doctrine. The opinion on page 39, the Paramount opinion, I have read two of those excerpts, and it clearly indicates that the General Electric case on the charge of monopoly—the Paramount case had to do with monopoly as well as Section 1—but on the charge of monopoly that likewise the General Electric case gives no protection in the circumstances of a case of this sort.

Now, the next matter is the matter of purpose. Must it be shown—This is where the argument came up. Must it be shown that the defendants intended to monopolize or that they had a purpose of monopolizing? 11784

In the very recent case, the Paramount case, the court said—this is in the middle of page 40 of our brief:

"... we pointed out in *United States v. Griffith* ... that 'specific intent' is not necessary to establish a 'pur-

pose or intent' to create a monopoly but that the requisite 'purpose or intent' is present if monopoly results as a necessary consequence of what was done."

That, of course, follows the same reasoning as in the intent cases? It is not necessary to show that the parties intended to do what they did. The opinions are full on that score. All that is necessary is to show that they did what they did.

Back on page 34 I can read from the patent case, which is as clear as any. This is at the foot of the page:

"Bearing in mind that such was the nature, object and scope of the conspiracy, we regard it as altogether plain that by its necessary operation it would directly and materially impede and burden the due course of trade and commerce among the states and therefore inflict upon the public the injuries which the anti-trust act is designed to prevent * * * And that there is no allegation of a specific intent to restrain such
11785 trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary."

We think that language, "cannot be heard to say the contrary", means just what it says, that where you find a group, a combination, in charge of an industry, which meets all the other tests—it is a combination, they are former competitors, it does constitute restraint of trade; whether they intended to or not is immaterial, and they cannot be heard to say that they didn't intend.

That will dispose, may I say, of maybe 10 or 15 of the proffers of proof in this case.

They say: "We didn't intend to eliminate jobbers, we didn't intend to do this, we didn't intend to do that, or at least it hasn't been shown that we didn't intend."

The court has said, without any equivocation at all, that you don't have to show that they had a specific intent. Probably the strongest language is in the Griffith case itself, here on page 35, where they cite Mr. Justice Learned Hand:

"It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly
11786 results as the consequence of a defendant's conduct or business arrangements * * * To require a

greater showing would cripple the Act. As stated in *United States v. Aluminum Company of America* * * *, 'no monopolist monopolizes unconscious of what he is doing.' Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the act."

If we couldn't show that they fixed prices or that they did any of these other things, then we might have to show that they intended to do so in order to build a conspiracy, but where they have fixed prices and where they have eliminated competition, then there would be no need of any showing of specific intent.

Chief Justice STEPHENS: Are you not unavoidably thrown back, even in your monopoly argument, to the difficulty with respect to action in concert? Because if the *United States Gypsum Company* had licensed only one competitor to manufacture closed-edge board, or after the expiration of the Utzman patent, licensed one to manufacture "bubble" board and "starch" board, then just as in the *General Electric* case as between Westinghouse and General Electric, there would have been a complete monopoly so far as the manufacture and sale of gypsum board, or tungsten filament in the *General Electric* case, is concerned.

Yet, the Supreme Court apparently does not condemn as a monopoly the situation that exists in the *General Electric* case although 85 percent of the trade was controlled at the outset, and, as I remember the figures, ultimately 97 percent of the filaments made and sold were tungsten. The Supreme Court apparently does not condemn as a monopoly a single patent license to one licensee with price-fixing provisions although that does result in a monopoly, just as truly a monopoly as where you have a dozen licensees, because by definition no one can manufacture and sell the patented board except the patentee and the single licensee.

There is a monopoly, a complete monopoly, in that situation. The Supreme Court holds that monopoly not illegal, just as it held the monopoly in the *General Electric* case was not illegal. But it apparently holds in this case that, according to your contention, there has *prima facie* been shown a monopoly.

Doesn't that necessarily follow from the fact that the Supreme Court sees in this case more than one licensee. Therefore, isn't the monopoly argument necessarily tied into the question of action in concert?

Mr. STEFFEN: I would answer that: It is true that the Supreme Court found that there was a *prima facie* showing. I am moving the argument on further, as you appreciate, to show that there, moreover, is no genuine issue as to any material fact. I think that on your express question 11788 that perhaps the court is illogical. I can make the same argument I did before. I don't think this Court can, in the face of these several decisions, however, expand once more or attempt to expand the doctrine of the General Electric case to cover a broad situation of this sort.

The court has been very explicit. It may not be logical, but it has been very explicit.

I would make the argument that we did on the bearing some time ago, that while logically you can say that in the General Electric case there was, while only one, a license which covered perhaps 75 percent of the production, that here we do have a 100 percent; and if you had to make a distinction in terms of percentages, that we have here a complete monopolization of the entire area East of the Rocky Mountains.

Chief Justice STEPHENS: I am not suggesting at all, Mr. Steffen, of course, that we should attempt to expand any ruling made by the Supreme Court. If we can find what the Supreme Court ruling means, we are commanded to follow it since we are trial court judges and bound by the Court's decisions.

The point of my question was merely this: I understood you to argue that apart from the question of action in concert and entering into industry wide license agreements, there is a clear case of monopoly established here.

Mr. STEFFEN: That is right.

Chief Justice STEPHENS: And I am still puzzled 11789 to know how you can teach that without first meeting the contention, that I suppose the defendants will make, that they still have a right to be heard and to have a day in court on the question whether or not they did act in concert.

Mr. STEFFEN: On the monopoly charge?

Chief Justice STEPHENS: In entering into the licenses, more than one license, which resulted in a monopoly.

Mr. STEFFEN: In my argument I attempt to show that so far as the conspiracy charge is concerned, that the defendants in effect have admitted that they entered these licenses each knowing that the other was going to enter or that the others did enter and that beginning with May, 1929, on

straight through we have a fairly clear record that there was adherence to a common plan with knowledge that the others were adhering to it and carrying it out.

Now, let's look at the monopoly charge. The test of whether you have a monopoly has been pretty clearly stated in the American Tobacco case, as the most recent case. On page 40, we lay it out, the quotation there from Mr. Justice Burton:

"A combination may be one in restraint of interstate trade or commerce or to monopolize a part of such trade or commerce in violation of the Sherman Act, although such restraint or monopoly may not have been actually attempted to any harmful extent"—

11790 In other words, he is saying you may have a monopoly even though you didn't carry it out, and then he goes on:

"The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised"—

For example, to high and arbitrary levels.

"—and that competition actually is excluded but that powers exists to raise prices or to exclude competition when it is desired to do so."

Now, in the American Tobacco case, it came up on that narrow issue, whether or not there had to be a showing whether they had charged monopoly prices or that they actually had kept other people out of the industry. The court said, to make out a case you just have to show that they had the power, nothing else, to exclude competition or to charge monopoly prices.

Now, in our case we are so limited. We can show they did charge monopoly prices and that they did exclude competition. There is no question in the case at all but what they are all of the manufacturers in the area East of the Rocky Mountains. There is no question in the case at all but what they charged just such prices as they saw fit, not only a monopoly in the sense that a small group might do it but a monopoly in the sense that Mr. Sewell Avery alone could practically dictate what the prices and all the terms and conditions in the industry should be. That is

11791 about as supreme a monopolistic power as you can get. Moreover, he used it.

So that, on the charge of monopoly, as you prove a monopoly, you prove it simply by showing that they are all the manufacturers in the area covering an appreciable

amount of commerce and that they not only had the power to charge monopoly prices but that they did charge monopoly prices.

Mr. Bromley says, "Of course, we fixed prices and fixed prices of our competitors." They had a complete monopolization, since November, 1929.

Now, on the matter of excluding competition, we point out on page 41 there that there has been an exclusion in the sense that Niagara, Universal and Atlantic have been brought up, Oakfield has been brought up, and, while this action has been pending, Texas has been brought, as we understand it, by Celotex, and that, therefore, you have a steady process of concentration in the industry.

But beyond that the matter of jobbers, that is, the distribution part of the business, the matter of excluding jobbers. There is no question in this record at all, and the defendants do not offer to prove by their proffer of proof, that jobbers have not been excluded.

I might say to your Honors that when we were before the Supreme Court, the point that was argued here was made. Mr. Bromley was saying to the court that, "Well, there are jobbers in the industry." The court questioned him as to, "Well, what do you mean?" And he says, "Well, there are still jobbers in the industry."

And then the Chief Justice leaned over and he said, "Well, what do you mean? They just do business for the love of it?" And everybody in the court room excepting counsel for the defendants laughed.

Jobbers have been eliminated in the industry, and that under the test of the American Tobacco case, if you have a group of people in an industry who have power either to charge monopoly prices or exclude competition (and not only do they have the power but they have done it), you have proof of a conspiracy.

We also took up the matter of Cardiff Gypsum Company. We have quite a lot of material in the record. Defendants do not offer to prove anything to the contrary in their proffer of proof. Cardiff Gypsum Company must be taken to have been eliminated, and that is certainly exclusion of a competitor.

That, I take it, will conclude my formal argument.

My main purpose next, your Honors, is to take up each of the defendants' offers of proof. I think, perhaps, it would be better to hear Mr. Bromley on what he proposes

to prove in the light of that, and then I can take up in my remaining time what we think of those various offers of proof.

We put them in three broad categories. There are 29 of them.

Chief Justice STEPHENS: If you can conveniently do so, I think it might be better, so as not to be confusing to the Court, to discuss the offers of proof now. If, after Mr. Bromley discusses them, you wish to be heard in reply, we will give you an opportunity.

Mr. STEFFEN: All right.

Does the Court have before it the defendants' Offer of Proof?

I have three categories. We have one category which includes 29 of the offers in which, as we see it, for purposes of this motion, there is no dispute. In fact, much of the evidence that they offer is already in the record. In fact, I think practically all of this is in the record. That is 29 of the itemized offers.

We have another group of about 11 where their main contention is that they didn't intend to do this or didn't intend to do that; and our position there is that it doesn't make any difference whether they did intend to or not, they did do it; and they don't deny that they did.

Our third category is a group of about 22 proffers which are phrased in terms of "there is no agreement or no understanding (to do what they did)", and I would like to take them up separately. If I may just list the first group—if you want to check these, we say that Offers Nos. 4, 6, 7, 8, 9, 10, 11, 12, 13, 19, 21, 22, 24, 25, 26, 27, 28, 31, 32, 33, 34, 35, 36, 38, 39, 40, 43, 50, 61 and 62—

11794 Chief Justice STEPHENS: All those marked with a check mark, you contend are what?

Mr. STEFFEN: Those are restatements of fact that are already in the record or of things that are not in issue for purposes of this motion.

Chief Justice STEPHENS: Restatements of fact that are already—what?

Judge JACKSON: In the record.

Mr. STEFFEN: In the record or not in dispute for purposes of this motion.

Chief Justice STEPHENS: Very well.

Mr. STEFFEN: I will give you as an obvious example No. 6 on page 2:

"Beginning prior to 1912 and continuing thereafter U. S. G. developed by its own research the new closed-

edge gypsum board and the processes for the manufacture of the same, and obtained", and so on, and so on.

Then, continuing:

—"covering said improved closed-edge board and subsequently other patents covering said improved board and the processes for making the same . . . covering a complete machine and apparatus for making said patented board, which was issued on February 10, 1920. All of these inventions were made by employees of U. S. G. in the performance by them of research work for which they were employed, and the applications for and letters patent for such inventions were duly assigned to U. S. G. as its own property."

A lot of that is in the record, it is in your Honor's opinion, and it would be a complete waste of your Honors' time to listen to the defendants put all that stuff back in; and even though it were now introduced, it would be immaterial anyway. It doesn't change the determination that your Honors would make; whether it was prior to 1912 that they began their research, and so on, is more or less beside the point.

Now, I think that is true, with some variations, perhaps, but it is true, I think, of all 29 that I have read. This cuts their proffer of proof in two.

I call your attention to 36, for example over on page 14, which says:

"The licenses, in the form of a single document replacing the prior license of the licensee and including the starch patents and bubble board applications, were subsequently mailed to the licensees. Niagara", and so and so, and then they cite the Government's exhibits.

Well, what in the world—they are exhibits, they are in evidence already. Why bother with any further offer of proof on that score? All of those offers, as we see 11796 are already part of the case and there is no issue on them, and the defendants ought not be permitted to take the Court's time.

Now, the next list. This category is composed of those cases where they are contending that there was no purpose or intent on the part of the defendants to do the things that were subsequently done.

Chief Justice STEPHENS: No intent or purpose?

Mr. STEFFEN: No intent or purpose to do what was subsequently done. They are: 5, 46, 47, 48, 49, 51, 52, and 53.

Chief Justice STEPHENS: It that all?

Mr. STEFFEN: 56, 57, and 59. Those are all clearly phrased in terms of purpose or intent, as we read them, and since purpose or intent is immaterial, assuming you are shown a combination, as we think we can, those offers are out of place and would not justify the defendants going forward in their case.

All the remainder, which I do not need to list I take it—

Chief Justice STEPHENS: It will be convenient for me, if we list them and mark them with the third type of legend, I am marking each one with a different kind of mark.

Mr. STEFFEN: These are no-agreement cases.

Chief Justice STEPHENS: That is, 1, 2, 3—

Judge GARRETT: We can get these from the official 11797 reporter.

Chief Justice STEPHENS: It helps me to get them down now. 14, 15, 16, 17, 18, 20, 22, 23. What is 22?

Mr. STEFFEN: 22 I placed in No. 1 category.

Chief Justice STEPHENS: That is in No. 1 category?

Mr. STEFFEN: Yes, sir.

Chief Justice STEPHENS: I am sorry, I didn't understand that. 23, 29, 30, 37, 41, 42, 44, 45, 54, 55, 58 and 60.

Now, what category do you put those in?

Mr. STEFFEN: Those are in the "no-agreement" or "no-understanding" category.

I can illustrate that with 56 and 57, your Honor. It says:

"The license agreements were not executed with any intention to eliminate jobbers. There was no agreement or understanding among the defendants or any of them to eliminate jobbers."

No. 57 says:

"The discontinuance of the jobbers' discount provided for in the price bulletins resulted solely from the exercise by U. S. G. of its right to establish price for a patented product. U. S. G. did not have any agreement or understanding with the other defendants or any of them that such discount would be discontinued."

11798 Now, you will notice that 56 and 57 do not offer any new evidence, they do not offer any evidence as to whether jobbers have or haven't been eliminated, and therefore our *prima facie* case stands, that they have been eliminated.

The Supreme Court held that this was the class of distributors that have been squeezed out.

The whole argument, therefore, turns on whether they intended to eliminate jobbers. I have read you from the patent case and many others that whether they intended to do what they did is beside the point, or that there were no agreement or understanding among the defendants or any of them to eliminate jobbers.

Now, that no-agreement or no-understanding in one aspect is very similar to intent—that they didn't intend to eliminate jobbers, that there was no understanding that they would eliminate jobbers.

In the other aspect it ignores entirely the way you prove a conspiracy east. You don't have to prove a preliminary understanding or agreement. The Interstate Circuit and the Masonite cases,—and those cases cite many prior cases, and they say all you have to show that there was at some time adherence by the defendants to a common plan, whether there was a preliminary agreement or understanding in the record showing that they intended to do or that they had agreements to do it is beside the point.

11799 What is important is to show that at a time they did give their ear to a common plan of course of action which resulted in the restraint of trade. When you look at all of these in that light, all of these, some 22 offerings which are phrased in terms of "We didn't have any understanding or any agreements", you have to push them to one side. They are irrelevant.

What you must show, and what we think we show without any question at all, is that there was adherence at sometime—and we think it was very early—to a common plan or course of action, the necessary consequence of which was restraint of trade. And in this case, restraint of trade, according to the Supreme Court, did follow, and it had no protection under the General Electric doctrine.

The Masonite case, I think, sustains that position completely, but I think I will defer my further argument until after Mr. Bromley is finished.

Chief Justice STEPHENS: Will you please recapitulate your last point for me?

Mr. STEFFEN: The last point, your Honor, is that the defendant's offer or proffer of proof to show that there was no preliminary understanding or no understanding or no agreement among the defendants, (for example, to eliminate jobbers; for example, to have a given price for gypsum board; or, for example, to control distributors:

or, for example, to have only a certain amount of dunnage in their cars, no prior understanding or agreement that they were going to do just that) is substantially asking us to prove that there was a specific intent to do what they did do; and what we have to prove is not this preliminary understanding or agreement but to prove simply that they did restrain trade, that they did, all of them, know that they were doing it, that they acted concertedly, each with the knowledge that the other was doing it, and that the result was, as in this case, the complete regimentation of the industry since 1929. We come at it from the other end and show that we do have a combination astride the gypsum industry, that it has fixed prices throughout, that it has eliminated jobbers—which is admitted—that it has done all of these other things—and the Supreme Court has said that it would cripple the Act.

And they said we could now only get rid of that combination by showing something which is more or less beside the point: that they intended to do that. We don't care about that.

For purposes of proof, after you have a combination in control, as in this case, the court has been very explicit that you do not have to show that they intended, or, as we see it, that there must have been a preliminary understanding or agreement.

Chief Justice STEPHENS: The Court will be in recess until 2 o'clock.

11801 Thank you, Mr. Steffen.

(Whereupon, at 11:59 a. m., a recess was taken until 2:00 o'clock p. m., of the same day.)

11802 AFTERNOON SESSION

2:00 p. m.

Chief Justice STEPHENS: Mr. Bromley.

Argument on Behalf of the Defendants

By Mr. BROMLEY:

Mr. BROMLEY: May it please your Honors, in order to decide this motion, an answer must be given to the fundamental question. That question may be phrased variously, but in substance, it is this: Is industry-wide licensing with price fixing followed by adherence thereto on the part of the licensees ever in any circumstances lawful?

To put it another way: Is industry-wide licensing with price fixing followed by adherence on the part of licensees to the price provisions illegal *per se*?

What has the Supreme Court said about that in this decision?

As I listened to Mr. Steffen this morning, it seemed to me that he has ended up, taking everything that he has said and trying to judge its total effect, by the assertion that a mere plurality of licenses with price-fixing provisions, observed and adhered to, is *per se* unlawful, and, therefore, there is nothing relevant or material which the defendants could possibly offer since it is admitted that licenses were executed, that they did have price fixing provisions, that

there came a time when they were industry-wide, 11803 and that the licensor fixed the prices and enforced its rights in that regard as best it could, and the licensees in the main observed the prices. Albeit there is a great deal of evidence that many of them were astute to find ways to avoid their obligations in that regard.

Our position is that the Supreme Court decision did not by any means enunciate the principle that mere plurality of licenses resulted in *per se* violation of the Sherman Act.

Judge JACKSON: Even though it blankets the whole industry?

Mr. BROMLEY: Even though it blanketed the entire industry 100 percent, and even though there was strict adherence on the part of everybody to the price-fixing provisions of the license.

That interpretation of the Supreme Court opinion is outlined in our brief and proceeds somewhat in this fashion: The court reversed the order of this Court which dismissed the complaint, concluding that by the record now presented violation of the Sherman Act is clear. That is at pages 401 and 402 of the reported decision.

Chief Justice STEPHENS: The reported decision of the Supreme Court?

Mr. BROMLEY: Yes, sir, 333 U. S.

Chief Justice STEPHENS: You don't have that reference in the slip opinion, do you?

11804 Mr. BROMLEY: I can get it, yes, your Honor. It is page 36.

Chief Justice STEPHENS: What is that statement now, Mr. Bromley? Read it again?

Mr. BROMLEY: It is from page 36, line 3:

"By the record now presented, violation of the Sherman Act is clear."

That is in the concluding paragraph of the opinion. But before reaching that conclusion and as essential foundation

to that conclusion, the court decided two matters: first, it decided that the declarations and acts of each of the defendants were admissible against all of the defendants as declarations and acts of co-conspirators, and, second, it decided that certain findings of fact made by this Court would bar a reversal of this Court's order of dismissal if the findings of fact were accurate.

It found that the findings of fact referred to were erroneous. So that I say, as foundations to its conclusion that the proof established violation of the Sherman Act, it first had to find that it could consider the declarations as binding upon everybody.

What for? Obviously, to show purpose, pre-arrangement, scheme, plan, conspiracy; and it, secondly, found that it could not reverse the order if the findings of fact were correct.

Well, what is the most important finding of fact 11805 made by this Court in that respect? It is Finding No. 118, that there was no plan to blanket the industry.

In discussing the declarations and holding that they were binding upon everybody, the Court was careful to point out that the license agreements and the price bulletins were sufficient to establish a prima facie case of conspiracy and that the license agreements and the bulletins establishing a prima facie case of conspiracy, the declarations of each were binding upon all.

Now, the findings of this Court which were set aside were not merely Finding No. 118, to which I referred, which was that the defendants did not associate themselves in a plan to blanket the industry under patent licenses and stabilize prices, but they were also findings of fact in great detail to the effect that there was any agreement among the defendants to eliminate the production of open-edge board.

Thirdly, that the license agreements were not executed with an intent to eliminate jobbers, that the discontinuance of the jobber's discount was merely the exercise by the licensor of its right to establish a price for a patented product, and that complaints by licensees that other licensees had sold to jobbers at a discount did not establish concerted action to eliminate either the jobbers or the discount.

Finally, those findings, all of which were reversed, made by this Court that there was not any understanding 11806 that price would be raised or fixed upon plaster or upon any unpatented products, and that the bulletin

provision prohibiting the reduction of the price of unpatented goods was designed merely to protect the price of the patented products and was not used to stabilize the prices of unpatented materials.

Furthermore, the Supreme Court found it unnecessary to determine whether or not the other findings of this Court were erroneous, but stated that enough had been said by the Supreme Court as to the findings and the evidence to enable this Court to pass upon the facts as they may come before it on further production in accord with our present ruling.

Now, I say that in view of the Supreme Court's action in setting aside these findings which, after all, went to the heart of the charge of conspiracy, it must be presumed clearly that the Supreme Court regarded the evidence of the Government as establishing *prima facie* merely that the defendants had associated themselves in a plan to blanket the industry and that there were agreements to eliminate open-edge board, to eliminate jobbers, and to stabilize the price of unpatented products.

The Supreme Court's reasoning, I think, may be analyzed in summary form this way: The license agreements and the bulletins established a *prima facie* case of conspiracy. This *prima facie* case having been thus established, the declarations became admissible against all. In view of 11807 all evidence, then—that is, the *prima facie* combination flowing merely from the license agreements and the price bulletins, plus the declarations—in view of all of that, the Supreme Court concluded that there was *prima facie* evidence of a conspiracy and the Supreme Court was careful to put in words just what that conspiracy which was *prima facie* established, according to it, was.

The statement of that conspiracy appears at page 34, at the bottom, of the slip opinion in the Gypsum case. The paragraph starts:

"The General Electric case affords no cloak for the course of conduct revealed in the voluminous record in this case. That case gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized."

Now, I conceive that that is the statement of the conspiracy which the Supreme Court has said was *prima facie* established, and I say that the opinion then establishes nothing more than this:

At the end of the Government's case, the Government
11808 ment had met its initial burden of making out a *prima facie* proof of combination sufficient to withstand our motion for dismissal and that the *prima facie* conspiracy thus made out was something more than a mere plurality of licenses.

Now, if it weren't, why the necessity for setting aside the findings? If mere plurality of licenses was enough, the Supreme Court would have conceded the accuracy of the finding, perhaps, that there was no plan, but would have said such a finding in these circumstances is without legal probative force because you don't need a plan in order for the Sherman Act to condemn industry-wide licensing.

Isn't it plain that the Supreme Court by that action in reversing these findings and sending the case back has said, "You have got to have something more than industry-wide licensing; you have got to have a plan, not a plan resident in the multiplicity of the documents themselves, but a plan outside of the documents, an understanding among everybody that the documents would be used to accomplish"—what? —To accomplish the description which it states on page 34 is the conspiracy is it judges from the evidence was *prima facie* established. The *prima facie* conspiracy which the Supreme Court said was established by the Government at the end of its case involves the four elements which the Government charged in its pleading: a plan to blanket the industry, an agreement to eliminate
open-edge board, an agreement to eliminate a class
11809 of distributors—that is, jobbers—and an agreement to stabilize the price of unpatented products.

The Government in its statement of points and authorities filed two weeks ago accepts this same view, it seems to me, of the court's opinion, because in that document, in Points 3 and 4, it says that the proper inference to be drawn from the basic facts is that the defendants associated themselves together in a plan to blanket the industry under licenses and stabilize prices, and then repeats the four elements of the plan as I have read them and as the Supreme Court described them and listed them on page 34 when it summarized the conspiracy which it said had been established *prima facie*.

Now, Mr. Steffen, I think, has on the argument abandoned that position and said that the Supreme Court has enunciated the doctrine that mere plurality is enough and there is no defense against that.

Well, the Line Material case, for me, throws a good deal of light upon the soundness of Mr. Steffen's contention. You will recall in that case that the court distinguished the General Electric case on the ground that there was a combination of cross-licensing of two non-infringing patents for the purpose of controlling prices and stabilizing the industry. But it is plain from that opinion that the court placed its stamp of approval upon everything that was done there short of cross-licensing, because in the 11810 recitation of facts near the beginning of the opinion under (Roman) I, "The Facts," it adverts to these undisputed elements. On page 9 of the slip opinion in Line Material, down about 10 lines:

"There can be no doubt, however, that each licensee knew of the proposed price provisions in the licenses of other licensees from the circulation of proposed form of other licensees from the circulation of proposed form among the licensees and an escrow agreement, fulfilled July 11, 1940. That agreement was entered into after General Electric took its license and required for fulfillment the acceptance of identical licenses by Matthews, Kearney, and Railway. The licenses that were the subject of the escrow contained the price provisions of General Electric's license. This awareness by each signer of the price provisions in prior contracts is conceded by appellees' brief. A price schedule became effective January 18, 1941. Thereafter, all the appellees tried to maintain prices. Where there was accidental variation, Line wrote the licensee calling attention to the failure."

"The licenses were the result of arm's length bargaining in each instance."—A fact which we are anxious to prove in this case.

11811 "Price limitation was actively opposed in toto or restriction of its scope sought by several of the licensees, including General Electric, the largest producer of the patented appliances. A number tried energetically to find substitutes for the devices. All the licensees, however, were forced to accept the terms or cease manufacture."

Now, isn't it perfectly plain that as far as the Line Material case is concerned, those facts, even more indicative of concert of action than in our case, because of the presence of the escrow arrangement in Line, all of those facts were thought by the Supreme Court not to result in condemnation of the arrangements there found, but that the sole reason for holding that the law had been violated was that a majority of the court thought there was an unlawful arrangement between two patent owners by virtue of the cross-licensing of the Lemmon and Schultz patents even though there was interference between the two patents in the sense that while Lemmon dominated Schultz, Schultz' was an improvement patent and the superior product could not be practiced without the use of both patents. It would not have been necessary to rest the decision upon that ground in view of the Gypsum case if mere plurality of licenses in the mind of the Supreme Court was enough to result in violation of the Sherman Act; nor would it have been necessary in the Gypsum case to do more than say that mere plurality of licenses being established without dispute, adherence on the part of everybody to the prices fixed and everybody being 100 percent of the industry is enough in itself to violate the Sherman Act.

I submit, if the Court please, that the Supreme Court has indicated plainly that there is an area of proof which the defendants are entitled to show if they can to rebut the prima facie inference which the Supreme Court drew that there was a conspiracy to accomplish, broadly, regimentation of the industry both in its patented and in its unpatented products, and that there was a conspiracy to regiment the industry by means of an intentional destruction of a class of distributors—to wit, the jobbers—and an intentional suppression of the manufacture of the so-called unpatented open-edged board.

I detect in Mr. Steffen's argument the constant urge of contending that the General Electric case has been overruled. Certainly, he makes no bones about saying that the General Electric case has been confined to one licensee. Well, that was not the court's position in the Line Material case, because there admittedly, there were a number of licensees as many as there were in the Gypsum case, all with identical licenses, all entered into with knowledge, and most, if not all of them, put up on a conditional delivery, the condition of which was that General Electric or somebody else or some certain number should take licenses. That was a de-

vice, a common device, to insure action in concert
 11813 and to make certain that no one became bound unless all became bound.

In the Gypsum case, all that the Supreme Court has said is that "looking at the declarations we think *prima facie* the defendants should be called upon to explain and rebut the inference that these licenses were given and taken by reason of a prior understanding that this would be a good way to regiment an industry which prior to taking of the first license had been troubled, if you will, by a price war."

That to me means that we must necessarily have an opportunity to introduce evidence rebutting that inference.

Now the Government in its points and authorities assert that the basic or subsidiary facts in the instant case are not in dispute. The dispute between the parties is as to the proper inference to be drawn from the basic facts.

Well, I take it that every fact in the case is in dispute except the plurality of licenses containing price-fixing provisions and subsequent adherence to those provisions.

Chief Justice STEPHENS: It is not in dispute that the licenses were executed, is it?

Mr. BROMLEY: No, sir. I meant to include that, that the licenses were executed, that they did have price-fixing clauses, and that the price-fixing right was exercised and enforced and that the licensees observed their obligation in the main.

Chief Justice STEPHENS: I said in the opinion of
 11814 the Trial Court, speaking for the Court, something almost to the effect which you said yourself, that there was no conflict of evidence in the usual sense, that the conflict was one of inferences to be drawn from the evidence. But I had thought, myself, that that kind of conflict, nevertheless, raised issues of fact—where there is a dispute as to the inferences to be drawn from admitted facts, which inferences lead to determination of the ultimate facts in issue in the case—that there was thus an orthodox conflict in the case despite the fact that some basic facts might not be disputed.

Mr. BROMLEY: Of course, I think that is entirely sound. I don't know what the Government means by the basic facts not being in dispute. I was suggesting merely that they can mean no more than the execution of the licenses. Their contents and their observance are not in dispute.

Certainly; the contention supported by some evidence in the form of a declaration that Mr. Avery was not willing to

license anyone unless all took licenses is in dispute, and we want to prove, among other things, from Mr. Avery that it was his position at all times that he was willing to license any or all or any number at any time and cared not a whit what anybody else did.

I was surprised this morning to hear Mr. Steffen, as I understood him, say that Proffer of Proof No. 4 was not disputed by him or that it was already proved in the record, one or both.

Proffer of Proof No. 4 is a very short one:

"At all times the licensor was willing to license any one manufacturer without regard to whether or not a license was taken by any other manufacturer or manufacturers."

I am glad to know he doesn't dispute it, if he doesn't, but my problem of proof and the reason I want to prove that from the lips of a witness is that I am aware of the fact that there is in evidence a declaration by somebody which the Supreme Court says is binding on my client, to the effect that Mr. Avery was not willing to license unless all took a license.

Chief Justice STEPHENS: The point at which I made the remark in question is page 105 of the printed trial court's opinion, which was made by the defendants. I don't have the reference to it in the Supplement handy. It reads:

"The evidence offered by the Government in the instant case is mostly circumstantial and the subsidiary facts in the case are largely not in dispute; it is in respect of the meaning of these facts, of the inferences to be drawn from them, that the parties are in contest."

Mr. BROMLEY: Now, what is it the defendants desire to offer by way of evidence?

11816 Well, to summarize it, the defendants deny and have always denied that there was any plan among them to blanket the industry with patent licenses and stabilize prices. Accordingly, they have offered to prove in the very first numbered item of their offer of proof that there was not any agreement or understanding between the Gypsum Company and the other defendants or any of them that they would associate themselves in a plan to blanket the industry under licenses and stabilize prices or that they would issue or cause to be issued substantially identical licenses to all the defendants or any of them; and we desire to call the men who were concerned with the negotiation, preparation and execution of the licenses on behalf of the

licensor to testify that in offering and issuing the licenses, to the other defendants, the licensor acted independently, not by virtue of any plan or understanding with anybody, that it would exercise its right to fix prices, that it would fix prices, that it would or would not put a price-fixing provision in the license, and that we were at all times willing to license anybody who was agreeable to the terms which we laid down in December, 1925, and from which we never varied, from that date down to the present time.

Judge GARRETT: Didn't the Supreme Court substantially find that?

Mr. BROMLEY: It adverted to that fact, that we never deviated from our position, but I think it went on 11817 to say in spite of that and in spite of the fact that the writer of the declaration, who said that Avery was not willing to license one, in spite of the fact that Avery was willing to license one according to the Supreme Court, it found prima facie from other evidence that there was a plan.

Now, did it mean in saying that there was prima facie evidence of a plan what Mr. Steffen, it seemed to me, finally was driven to contend this morning, that the plan is to be found in the adherence with knowledge through the most favored nation clause, if you please, or otherwise, that others were likewise holders of licenses and adhering?

I thought that I detected finally a contention by Mr. Steffen that that was the plan about which the Supreme Court was talking.

-Well, it seems to me absurd to contend that that was the plan about which the Supreme Court was talking when it said that the conspiracy had been prima facie established. What the Supreme Court was talking was something that was arranged ahead of time and not something that sprang into being after the licenses were executed.

He adverted to the fact that in the 1932 meeting when Mr. MacLeish threatened the licensees with legal action or cancellation if they didn't observe the licenses, the licensees could then have withdrawn from the conspiracy, as he put it, but instead of withdrawing they went right ahead 11818 and observed their obligations under the license.

That is not what the Supreme Court decided. It didn't decide that the conspiracy sprang into being after the event and arose or flowed from the observance of the obligations imposed by the contract. What it said was

that there was prima facie evidence of a conspiracy to accomplish at least the four objectives listed in its opinion. That must mean that it thought there was evidence of action other than the mere offer of a license and its acceptance and adherence to its provisions. If it didn't mean that, then that would result, it seems to me, in the absurd conclusion that if you could have a situation, as the Presiding Judge indicated in his opinion, where nobody knew what anybody was doing, but over the years it finally came to pass without knowledge on the part of anybody that everybody in the industry was licensed, with price fixing, that that day a conspiracy would have resulted, and I suppose it is possible to conceive of a licensor owning a patent and offering a license and having its competitors, serially over the years, each taking a license without knowing whether or not anybody else had one. It is possible to conceive of that happening, and I also suppose Mr. Steffen's contention would be that that was unlawful when all or a substantial number had arrived at the point where they had licenses. I don't think the Supreme Court said that at all. I think it said 11819 there must be something other than the mere taking of the license, there must be a plan to blanket the industry and accomplish results in the minds of everybody beginning at some date and continuing thereafter, a plan to regiment the industry and to control prices, which goes way beyond the legitimate interest of a patent owner in protecting the rights given to him by the patent and enforcing them by the means of licenses.

Now, obviously, there could not have been, I submit, any plan, in the sense in which I use the word, to which the licensor was not a party, and the licensees could have every so many discussions among themselves as to what they should or would or could do, but unless the proof convinces this Court that the licensor was a party to an understanding or plan to do something more than merely offer a license to all comers, it is impossible to conclude that there was a plan or conspiracy which violated the Sherman Act.

That is why I submit that it is vital for the Court to hear the evidence coming from the patent owner, the licensor, the keystone of any conspiracy, if there was one, in order to determine whether the inference, which the Supreme Court has drawn from the declaration, of a scheme to go beyond mere patent licenses is actually the fact.

The defendants deny and have always denied that there was any agreement or understanding among them or any

of them to eliminate the production of open-edge board and they desire to prove and to show that they had no such understanding that the discontinuance of the production of open-edge board was due solely to economic reasons, that the defendants were at all times free to make it if they wanted to make it, but that there was no demand for it and it disappeared from the market not as the result of a conspiracy.

Judge GARRETT: Didn't that run throughout the testimony in the case as it was presented here; as you cross examined? Wasn't that stated by substantially every person who appeared on the stand?

Mr. BROMLEY: Yes, sir, there was a good deal of evidence that open-edge board was not marketable, was not desired by the trade, and was inferior in quality. That is true.

Judge GARRETT: And any additional evidence that might be presented in that regard would be cumulative merely, wouldn't it? What would be the value of additional testimony on that point? I am just asking the question.

Mr. BROMLEY: Confining my answer to the question precisely, the Supreme Court has said that there was a prima facie case in spite of that evidence, that there was a conspiracy to eliminate the production of open-edge board.

Now, if I were going to confine myself merely to the proof that it was not marketable and not any good and not desired, it might be cumulative, but, after all, I have an inference to overcome, and evidently the Supreme Court thought that evidence to which we have adverted was not enough to rebut the prima facie inference which it drew from the discontinuance of its manufacture as well as from the royalty provision in the license.

So I submit I am entitled, if my offer of proof were limited to purely cumulative evidence—that I am entitled, indeed, required—to put in more evidence to rebut the inference which the Supreme Court has said is at least prima facie.

But my offer of proof goes, I think, farther than that, although it does include that. I want to show that they were free to make it at all times, and I want to show the problems involved in its manufacture as tied in with the nature of the board-making machine, and to show how utterly absurd it would be for these men licensed under a patented machine which was designed to make closed-edge board, going to the expense of changing the machine from time to time, or making closed-edge board and trimming off the edges so it

would become open-edge board, and I want to show all the difficulties involved on the part of a manufacturer equipped to make the closed-edge product to turn back to make the inferior open-edge product.

Judge JACKSON: I thought they were making open-edge board prior to the time of taking the license.

Mr. BROMLEY: Some of them were.

Judge JACKSON: They must have the machinery for doing that.

Mr. BROMLEY: I don't think they had our patented machinery if they did, they were infringing.

11822 Judge JACKSON: But they had their own machinery. They would not have had to retool to do it. They already had the machinery to make open-edge board.

Mr. BROMLEY: In order to make closed-edge board, they would have had to get our patented machine.

Judge JACKSON: Surely.

Mr. BROMLEY: After they took a license and got our expensive patented machine, what I want to prove is that they wouldn't go back and use an old machine or a different process to make open-edge board. I quite agree they could and had been doing it before.

Likewise, we desire to prove that there was no understanding about the elimination of jobbers, that the discontinuance of the discount was due to the fact that the licensor by this time had its own sales organization which gave it sufficient coverage, and it had no use for jobbers and did not desire that its product be manufactured through that channel of distribution and not because it desired to eliminate their competition in order to get them out of the way.

Finally, we have denied and always denied that we ever had any understanding to stabilize or fix the price of plaster or any unpatented products. I want to show what the plaster prices were, to show that on the fact of the proof of what they were they bore no relation to board prices whatsoever, that they were not stabilized or fixed, that
11823 they followed market trends in the plaster market just the way the prices of any unpatented goods did, and to establish from that proof of the actual prices themselves that there was no relationship between the prices actually received for the unpatented and the patented products.

So that to sum it up, we desire an opportunity to submit evidence with respect to every finding which the court has set aside as erroneous in order, if we can, to re-establish the accuracy of those findings.

Now, there are a host of other issues. What do we do about the resale prices of manufacturing distributors?

The Supreme Court, it seems to me, leaves that up in the air.

Well, surely we have got to have a determination at some time, either before the case is closed or before a decree is entered, first, whether or not there was any plan to fix manufacturing distributors' prices, and, second, whether they were fixed.

Some evidence was introduced, some letters, a good many letters were introduced, which on their face might justify an inference that the licensor and the licensees were checking up on the prices charged by manufacturing distributors.

We have available as witnesses the three or men who acted as secretaries of the Board Survey company and who wrote most of the letters in evidence, who can testify as to why they were sent and what was being done in this regard. When that evidence is received and added to the evidence of the representatives of the manufacturing distributors who were called here and have testified, I think that any inference that any resale prices, so far as manufacturing distributors were concerned, were fixed will completely disappear as it did on the criminal trial.

But I apprehend in the present state of the record that we are entitled to introduce that additional evidence.

I think it is important to us, likewise—and this is another, perhaps, collateral issue, but one that is important to us—to offer proof having to do with the formation, the management, and the operation of this Board Survey company; to show that it was not the result of any plan or conspiracy to regiment the industry, but that its operations were confined in the same sense that the letters written in the Line Material case were confined to the protection of the rights of the patent holder in an effort to secure the faithful observance by the licensees of their obligations to follow our prices.

I think we are entitled to prove and should prove that the principal patents, at least under which the licenses were issued, were basic patents of such scope as to have great commercial value and that it was essential that each manu-

facturer have the right to use them in order to stay in business in competition with those who did have such rights.

11825 I think also we are entitled to show that each license taken or issued by U. S. G. was negotiated at arm's length, as the Supreme Court was careful to state was the fact in the Line case, and that none was executed with any purpose or objective not expressly set forth in the license.

I think we are entitled to justify the prices that we fixed under the license agreements to show that they were not arbitrary or unreasonably high in the sense that they bore no relationship to the value of the product.

I certainly think that we are entitled and should show through the evidence of witnesses familiar with them the purpose, meaning, and effect of the various license provisions contained in the license agreements, which the Supreme Court seemed to think were strong in raising an inference that there was a conspiracy and to show that every provision in there had a direct relationship to price and were not put in there to regiment the industry and secure something that a patent owner was not entitled to—that is, the production of standardized goods.

Now, I would like to turn a moment to Mr. Steffen's argument—

Chief Justice STEPHENS: I would like to hear you on Mr. Steffen's contention concerning monopoly, among other things you may wish to comment on.

11826 Mr. BROMLEY: Well, I won't read my note in that regard, which was to the effect that after your statement I thought it unnecessary to make any mention of his argument, but as I understand his argument, what he means by the monopoly contention is merely that there was a plurality of licenses. It is just another way of restating his contention that plurality of licenses is *per se* unlawful. Now, that, I think, is something of an afterthought, but there surely is no indication in the Supreme Court's opinion, as I read it, the plurality of licenses is *per se* unlawful because it constitutes a monopoly.

If the Supreme Court had thought that, wouldn't it have overruled the General Electric case?

Because, surely, no one can say there is any difference in the concept of monopoly between the facts of the Gypsum case and the facts of the General Electric case.

Your Honor repeated the percentages, the 85 percent resulting from the mere combination of General Electric and Westinghouse and the 97 percent when judged upon the basis of the character of the products made in the industry.

Now, surely, there can be no difference between 100 percent of gypsum board and 85 percent or 97 percent of tungsten-filament-incandescent lamps.

Judge JACKSON: That is what I thought prior to the Supreme Court's decision in this case.

Mr. BROMLEY: Well—but I still think so. I don't
11827 think there is any indication in the opinion that they intended to make that distinction.

I think, again, it all comes back to the Supreme Court's conception that there was *prima facie* evidence of a conspiracy here, something outside of mere plurality of licenses.

I think even this monopoly argument to some extent is tied into Mr. Steffen's argument or at least to the Supreme Court's theory that there was action in concert in the sense of an understanding or conspiracy in advance to regiment the industry by means over and above lawful patent licenses, a conspiracy to have unified action to which the licensor was a party, and an understanding that they would bring about industry control by means of these licenses.

Mr. Steffen started off his argument by reading us again from page 35 in the slip opinion in the Gypsum case:

"Even in the absence of these specific abuses in the case, which fall within the traditional prohibitions of the Sherman Act, it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices."

I think that means it would have been sufficient to make out a *prima facie* case. Certainly, its connotation to
11828 me is that action in concert is something more than the end result of an entire industry having licensees under a patent.

And so on page 34, the sentence beginning "The General Electric case affords no cloak for the course of conduct revealed in the voluminous record in this case", what they are referring to when they say "course of conduct" is the conspiracy which they describe in the very next sentence beginning "That case gives no support for a patentee, act-

ing in concert with all members of an industry", to issue and regiment and squeeze out and stabilize unpatented products.

Now, Mr. Steffen referred to that part of his brief on page 24 which contains the footnote referring to remarks by Mr. Justice Frankfurter in which he ended up by saying:

"I do not think logic, abstract logic, is going to solve this kind of a problem."

Chief Justice STEPHENS: Where is that in Mr. Steffen's memorandum?

Mr. BROMLEY: It begins at the bottom of page 24. He starts out by saying "That raises the question".

Chief Justice STEPHENS: I think perhaps that is the most dangerous obstacle you have, Mr. Bromley. The greatest defect I see in your argument so far, is that it seems entirely reasonable.

Mr. BROMLEY: That is a sin of which I am seldom guilty. That raises the question of whether that which is
11829 being done singly, being lawfully done, may by being done in combination be and creates a different problem. We agree that is the problem.

Then, he says:

"Well the argument proves too much and doesn't take account of the Carbide case"—referred to here as Carbide—and he says:

"Because he is a licensee of a patent, he does not have any freedom to get that patent, and yet it does invalidate a license that says if you take this you must also sell non-patented goods."

I suppose what he had in mind was that logically it is perfectly true—logically—that a patent owner ought to be able to license a man on condition that he use non-patented goods with the machine. All Mr. Justice Frankfurter was saying is he can't do that, although as a matter of abstract logic maybe he ought to be able to do that.

And so he says we cannot apply abstract logic.

But what did he do when he came to the Line Material case? Why, he swallowed the whole line of conduct which I have read: escrow agreement, knowledge on the part of everybody else, discussions, identical licenses, policing, everything else plus cross-licensing. According to his view, the kind of logic which he said should be applied in
this class of case, being something other than ab-

11830 stract, justified even the cross-licensing; as, indeed, I think was the sound view where you had patents of that interfering nature.

So that this colloquy, to me, does not reflect any view that because abstract logic does not solve all problems under the Sherman Act in the patent field, we must say that a mere plurality of licenses is by itself enough to violate the law. Surely he did not subscribe to any such view as that when he joined with the minority in the Line Material decision.

Now, on page 39 of the Government's brief, Mr. Steffen called attention to quotations from the Paramount Picture decision of recent date by the Supreme Court, and to the fact, in the first quotation, that the court started from the premise that a price-fixing combination is illegal per se and the statement that the court recently held in the Gypsum case that even patentees could not regiment an entire industry by licenses containing price-fixing agreements and applies that to the copyright owner situation in the picture business.

Then, at the bottom of the page Mr. Steffen called attention to the quotation in which the Supreme Court said:

"We stated in *United States v. United States Gypsum Company* * * * that 'the rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure
11831 pecuniary reward for the patentee's monopoly.'

The same is true of the rewards of the copyright owners and their licensees in the present case."

Now, the next sentence:

"For hereto the licenses are but a part of the general plan to suppress competition."

Now, that is what the court found in the Picture case, in this case from which this language is quoted, a "general plan to suppress competition." That is the important sense and one which characterizes every other word said in the quoted parts of the Supreme Court's opinion in that case.

There, as here, the Supreme Court was indicating that where there is a general plan to suppress competition, then the fact that a part of it is a license agreement with a lawful price-fixing clause does not save the plan.

Now, I refer again to Mr. Steffen's contention about adherence on the part of the licensees and their knowledge of what was being done after they took the licenses, and I refer to his argument stated at page 31 of his brief, in which he quotes the colloquy between the Presiding Judge and me at the trial. That quotation is preceded by the sen-

tence: "There can be no question"—beginning at the third line from the top.

"There can be no question whatever that from and after this meeting all the licenses were fully
11832 advised of the purpose of the licensing plan to fix prices, and gave their adherence to it. Moreover, it is admitted that what took place at the meeting was true for following this testimony there following colloquy ensued."

After making the quotation which established only that there was a meeting and that Mr. MacLeish told the licensees if they didn't observe their licenses and their obligations, that their licenses would be cancelled, or they would be sued, or the price-control feature would be eliminated from the licenses—that all appears at the bottom of page 30, as to what Mr. MacLeish said, what the meeting was about, and when it occurred, October 17, 1932, long after the licenses were executed for the most part.

Then, Mr. Steffen, after the colloquy, says:

"It is submitted that the meeting of October 17, 1932 is sufficient illustration alone to show that the defendants have acted in concert to fix prices and regulate the gypsum industry. Coupled with the other facts above described, it would suffice to make out a case upon which summary judgment could be based."

Well, I take it that that means you never could have industry-wide licensing if the provisions of the licenses were observed, and I am surprised at the assertion in that form, because it seems to me to be a new theory that we
11833 have no defense now because forsooth in 1932 by virtue of a meeting it is clearly established that all the licensees knew that everybody else had a license and was following the prices.

Well, I assume that was known long before this meeting, and, as I said in the Supreme Court, I assume that when each licensee took his license, he knew that somebody else had taken one before him—that is, everyone after the first one—and that, of course, they knew or assumed—and I am not going to attempt to prove that they didn't—that the other fellows were observing the prices which the licenses provided they should have observed.

So that I find it utterly impossible to conceive that the Supreme Court meant to indicate by its opinion that this kind of knowledge after the execution of the licenses, this kind of knowledge that each had the licenses and all were observing, was enough to establish a per se violation of the

Sherman Act to which there was no defense. I can't find anything in the opinion to indicate that in the slightest.

Now, over the page. In the colloquy with Mr. Justice Reed in the Supreme Court, Mr. Steffen takes comfort in the fact that Mr. Justice Reed said, near the bottom of the page:

"Also, if there is such favored nation clause, each of them must know that it is participating in the general plan."

I said, "Yes, sir; but * * *"

11834 I take it that everybody who had a most favored nation clause—and everybody did have one—assumed and thought he knew that his license was identical to everybody else's. That is what the clause said it would be, that is what he was entitled to have. He was entitled by that provision to have as favorable a license as anybody else had. I am perfectly willing to admit that every licensee was ready, willing, and anxious to take advantage of that opportunity and to make sure that he didn't have any more onerous conditions imposed upon him than anyone else.

I thought the rest of my answer made it clear that I was not conceding that there was any conspiracy in the sense that I thought we were talking about it in the Supreme Court, because I said:

"* * * but if the end result is legal how can their knowledge render it illegal in the end result; even with a multiplicity of licenses it is legal, and I do not understand that there is anything in Masonite which is contrary * * *"

In talking about elimination of jobbers, Mr. Steffen emphasized, as he did with respect to nearly every aspect of the case, that we cannot dispute that it has been proved that jobbers were eliminated.

Now, it may be that mere proof of the elimination of jobbers established a *prima facie* case from which an
11835 inference is permissible that their disappearance was due to an unlawful conspiracy; but surely we ought to be permitted to prove, if we can, that their disappearance was not the result of any scheme among us to get rid of their competition but was the normal result flowing from the lawful exercise of the right to fix price by the licensor; and surely evidence from the lips of the men who levelled off the jobber's price as to why they did it and the circumstances in which they did it will, I believe, aid in the ultimate determination of whether or not there was a scheme or plan to get rid of an uncontrolled source of dis-

tribution because, of course, we had no right to control jobbers' prices and did not control them.

Judge GARRETT: Mr. Bromley, may I interrupt at this point? On page 16 of this slip copy of the Line Material case—I am sure this has not escaped the attention of anyone—the writer of the opinion, Justice Reed, says:

“The writer accepts the rule of the General Electric case as interpreted by the third subdivision of this opinion. As a majority of the court does not agree with that position, the case cannot be reaffirmed on that basis. Neither is there a majority to overrule General Electric. In these circumstances, we must proceed to determine the issues on the assumption that General Electric continues as a precedent.”

Now, that presents a somewhat unusual situation 11836 in the Supreme Court, doesn't it?

Mr. BROMLEY: I think it does.

Judge GARRETT: No majority either way, and the interpretation that the writer of the opinion accepts is that of the third subdivision of this opinion—he accepts it, but there is not a majority with him on that, and then there is not a majority there for overruling it.

I don't know how much importance that is in the Gypsum case, but they refer us to the Line case, and we have to interpret Gypsum some way in the light of that. I don't know. I mean, interpret the opinion of the court in the Gypsum case and in the light of the opinion in the Line case, but there was no dissent or concurrences in this Gypsum case; it was a unanimous opinion; wasn't it?

Mr. BROMLEY: Yes, sir.

Chief Justice STEPHENS: All that he meant by referring to the third part of his opinion, as I read the Line Material case, was that he thought the Gypsum case did not permit cross-licensing of a dominant and a subservient patent. He couldn't get the other members of the court to agree to that, and there could be no agreement to overruling it; isn't that correct?

Mr. BROMLEY: You meant the General Electric case?

Chief Justice STEPHENS: Yes.

Mr. BROMLEY: Yes, your Honor, I think that is exactly right.

11837 Chief Justice STEPHENS: He meant that the General Electric case in his view did not permit cross-licensing of the dominant and subservient patent, and he could not get the other members of the court to agree with him on that subject—at least, not a majority. Also, he

could not get agreement to overrule the General Electric case.

MR. BROMLEY: I think that is all it means. He, therefore, says that the General Electric case continues as a precedent, and he says "We won't answer the various questions asked by the Government as to how it should be applied to the many and various situations which they put up to the court," but he says:

"On that assumption where a conspiracy to restrain trade or an effort to monopolize is not involved, a patentee may license another to make and vend the patented device * * *"

Judge JACKSON: Does that mean as long as no anti-trust proceeding is brought against them, it is all right, but that the minute the anti-trust proceeding is brought against them that General Electric is not a proper citation, not a proper reference?

MR. BROMLEY: I don't think it means that.

Judge JACKSON: What in the world can it mean?

MR. BROMLEY: I think it means that so long as you don't have a conspiracy—what I have been talking about 11838 all the afternoon long—as long as you don't have a combination to accomplish an unlawful result—that is, a conspiracy to regiment the industry in the broad sense described in the Gypsum case—it is still the law that you can have price-fixing in a license.

Now, true, he uses the singular when he says "a patentee may license another." I suppose he uses the singular only because the General Electric case, as a matter of fact, involved only one price-fixing license. It certainly would have been more helpful to everybody if he had said "A patentee may license another or others", which I think he plainly meant, and I refer again to that part of the opinion in which the plural is used, which I pointed out on the last argument.

Certainly, no one can logically justify the distinction between one licensee and two licensees where the amount of the restraint is the same, as the opinion of this Court has very clearly pointed out.

Chief Justice STEPHENS: Of course, there was a plurality of licenses in the General Electric case which, except for the patent laws, would have violated the Sherman Act. They weren't all price-fixing licenses. There was one which limited quantity output and one which limited type. But that seems not to have been commented upon anywhere.

MR. BROMLEY: No, and it is so strange that it wasn't

11839 because the obvious purpose in the General Electric case of this quantity limitation, as I think was made clear by the record, was to restrain those particular licensees to make sure that they didn't upset the price situation by limiting them very drastically to the number of bulbs they could produce in any year; and there certainly, in that sense, is no distinction in law between a quantity restriction and a price restriction.

On page 37 of his brief there is a curious argument, in which, for the first time I think, the Government attempts to draw an analogy between the cross-licensing in the Line case and the Gypsum case in so far as Gypsum's purchase of the Haggerty "starch" patent is concerned. That is an ingenious attempt, which I hadn't thought of before, but it seems to me that it fails pretty clearly because of the vice in the cross-licensing in the Line case was an agreement between the two where the right of the owner of the Schultz patent to fix prices was ceded by a contract to the owner of the Lemmon patent.

Now, there is no indication that the same result would have followed had the form of the transaction been a purchase. It seems to me you have to take that hurdle before you say that our buying the "starch" patent was bad under the Line case, because it resulted in our being able to fix prices in a patent owned by somebody else.

11840 Well, the fact is that there was a transfer of title and a purchase of the patent. We got it and owned and we fixed the price as owner.

Now, conceivably if the evidence—and there is some in the record today—established convincingly that that purchase was made pursuant to this broad general conspiracy to continue price fixing indefinitely or beyond the expiration of the Utzman patent, that the purchase would violate the Sherman Act; but one of the things we want to prove—and, again, there is some evidence of this in the record—is the circumstances under which we bought the "starch" patent.

I said the other day that it is inconceivable that the Sherman Act would have been violated if in the Gypsum situation Mr. Haggerty, the inventor, still owning the patent let us assume, had made a will and left it to the Gypsum Company and then died. It is inconceivable that any court would hold that the acquisition in such circumstances of the "starch" patent by us would have violated the Sherman Act. What we want to prove here is, from our side—from the United States Gypsum Company side—the circumstances surrounding our purchase of that patent.

Those circumstances have already been partially described by the witness Holland and they are, in brief, that we found ourselves in a most embarrassing position at the time we were offering the "bubble" license and were being accused by Holland of a gross and wilful and wholesale violation of his patent rights at the time we were sternly
 11841 admonishing our competitors that they were bad boys because they didn't observe ours; that, due to the fact that the Universal Company was in receivership and needed the money, our prime purpose and our only purpose was to relieve ourselves as cheaply as we could of a claim Universal had against us for infringement of the patent, and we bought the patent for that purpose, and it wasn't until afterwards that we realized we had a product patent under which as owners we could fix prices because of its fundamental nature as a product patent.

I say, again, that even if Mr. Steffen's theory had some merit—which I do not believe—that it merely emphasizes my contention that we should have an opportunity to show the nature of the purchase and the reasons therefor in order to rebut the presumption that it was analogous in purpose and effect to a cross license such as was involved in the Line case.

Now, so far as his comment on our offer of proof is concerned, he seems to reject, as entirely immaterial, intent, purpose and agreement. He says we shouldn't be heard because under the Supreme Court decision it is utterly immaterial for us to show there was no agreement, there was no intent, and there was no purpose. He classifies into
 11842 three classes all of our offers.

Now, as to those which he says are already in, the very first one he puts in that class, No. 4, says:

"At all times the licensor was willing to license
 11842 any one manufacturer without regard to whether or not a license was taken by any other manufacturer or manufacturers."

Well, it is in to some extent. If he concedes it, that is another thing, but it is not in with that degree of definiteness, it is not in from any witness representing the licensor or connected with the licensor, and that comment can be made, I think, of every one of the offers that he puts in that class.

It has been necessary in many of these offers for us to repeat, simply for the purpose of making our offers understandable, some such things as that there were licenses and that they were taken on certain dates, but in each instance

the offer, when read as a whole, contains some few facts not in the evidence at all or not conclusively and definitely established by the evidence, and we have not intended to repeat anything that is established by the evidence:

So far as the second class is concerned, "of no intent or purpose," the first one that he lists is No. 5, and it seems to me that the soundness of his contention can be tested by that one in which we offer to prove that our sole interest in bringing suits and in settling them and in offering and issuing licenses and enforcing them was to secure the full benefits of our patents and not to enter into a plan such as the Supreme Court has said had been established *prima facie* against us.

11843 So that it seems to me in that sense, intent or purpose is material, and I do not at all mean to suggest that unlawful price-fixing is unlawful only if there is an unlawful intent. I don't mean to trespass on that ground. I quite agree that if you fix prices, it doesn't make any difference what your intent is. But if you are charged with entering into a conspiracy, I think it does make a difference as to what your intent is—certainly, in the sense in which I have been construing conspiracy, as I believe the Supreme Court has defined it in that part of the opinion to which I referred.

Chief Justice STEPHENS: Didn't the Supreme Court say somewhere in the Gypsum opinion that the motive with which the contracts are entered into is immaterial?

Where was that?

Mr. BROMLEY: That is on page 27, in the middle of the page, I think, "We conclude"—page 27, a little more than half way up:

"We conclude that regardless of motive, the Sherman Act bars patent exploitation of the kind that was here attempted."

Chief Justice STEPHENS: Let me see what context that is in. Do you think, there the Supreme Court is not using the word "motive" in the sense of "intent", in view of the context in which it is being used?

Mr. BROMLEY: I don't know that I can answer
11844 that question. My view of that sentence is that where you have a conspiracy as broadly defined—that is, the Supreme Court says:

"... the trial court found that there was no agreement among the defendants"—to do all those things, and that—"The court further held—that as to all charges except the last two the defendants would have

been acting within the scope of the patent grant even if they had agreed to do the things charged. We conclude that regardless of motive, the Sherman Act bars patent exploitation of the kind that was here attempted."

I think all they mean is that in their view there was a conspiracy and it doesn't make any difference then what the motive for it was.

But I can't be clear about that, because they go on to say:

"The license agreements and the bulletins establish the conspiracy * * *. With the conspiracy thus fully established, the declarations * * * become"—binding.

"We think that all of the declarations and acts * * * are in aid of the ultimate conspiracy."

I think all that means is that assuming you have got a broad conspiracy which is made up of the agreements, the price bulletins, plus the declarations, and if you conclude there was such a conspiracy, then motive with 11845 which it was undertaken is immaterial.

But I still say that in determining whether there was any conspiracy, the intent with which the licenses were issued is material.

Judge JACKSON: That intent is a matter of inference, isn't it, rather than any expression, any inference, from facts?

Mr. BROMLEY: It is a matter of inference, but I think it is susceptible of proof from the licensor. For instance, if he testified that he got a patent and offered it to the world and did nothing else, never conferred with anybody about what he would or would not do, I think that is material evidence to rebut the charge which may flow from the execution of the licenses themselves, that he entered into a conspiracy and violated the Sherman Act. I think he is entitled to explain his conduct and his position as rebutting the charge that he entered into an unlawful arrangement with his competitors which he carried out by means of license agreements.

Chief Justice STEPHENS: We will take a 15-minute recess.

(Recess: 3:30 p. m. to 3:45 p. m.)

Chief Justice STEPHENS: Have any of the defendants a desire to be heard, other than through Mr. Bromley?

(No response.)

Chief Justice STEPHENS: If not, we will hear from the Government again.

11846 *Closing Argument on behalf of the Plaintiff*

Mr. STEFFEN: If your Honors please, I don't intend to take very much time.

Chief Justice STEPHENS: You have 30 minutes left, if you want to use it.

Mr. STEFFEN: I want to say just one or two things in regard to the proffer. I don't know that we will take an exception, your Honor, but I might point out that there is no affidavit presented and really no issue of fact. I do that for the purpose of getting the matter clear before the Court.

Under Rule 56, if the defendants wish to raise an issue of fact, they must submit an affidavit. The proffer is, of course, informative, but it is not probative proof.

Chief Justice STEPHENS: Have the courts ruled that they must submit an affidavit?

Mr. STEFFEN: No.

Chief Justice STEPHENS: I thought the rule said they may.

Mr. STEFFEN: They may or may not, but if they don't in the circumstances of this case, we have a *prima facie* case and nothing to the contrary. Technically, therefore, we would be entitled to judgment without argument one way or the other.

Then, I want to point out further that both
11847 National and Ebsary, while they have joined in the objection, they haven't put in anything. They don't even join in the proffer of proof—with the result that here we stand with an admitted *prima facie* case and they say "We object", but they don't put in anything at all upon which your Honors can rule.

Chief Justice STEPHENS: Is counsel for National here? Who is counsel for National?

Mr. KNUFF: Mr. Chase was here this morning.

Chief Justice STEPHENS: I thought he said National did join in the offer of proof.

Mr. STEFFEN: He joined in the objection, your Honor, but did not join in the proffer.

Chief Justice STEPHENS: Did he expressly say he did not join in the proffer?

Mr. STEFFEN: That is correct. I think that is correct, your Honor.

Mr. BROMLEY: I thought he said he stood on his answer.

Mr. STEFFEN: This has been passed upon, I should assume there is no proof at all. Allegations in an answer

are not facts for the purpose of weighing an issue at this time.

Chief Justice STEPHENS: I am not quite sure of that. I am not sure we can compel the defendants to make a proffer.

Mr. STEFFEN: No, I think not.

Chief Justice STEPHENS: We invited them to do so, in order that we might, if possible, clarify the issues 11848 in this case. On a motion for summary judgment, if a defendant can make out that the issues raised by his answer are genuine and material issues, would he not be entitled to a trial even though he doesn't make a formal proffer?

Mr. STEFFEN: He wouldn't need to make a proffer, your Honor, but he would have to put in an affidavit to support the position he had taken, and the cases, I think, are clear that a mere allegation in an answer, or even mere argument of counsel, is not proof, and you are now weighing the facts.

We have got a *prima facie* case—the defendants not putting in other facts in provable form by way of affidavit ordinarily.

Chief Justice STEPHENS: Of course, in Federal practice an opening statement, if sufficiently explicit and detailed, can be treated by the court as an outline of the defendant's case or the plaintiff's case, either one. The court can act. If the court, at the close of the opening statement on the part of plaintiff's counsel, feels that no case has been shown, it can dismiss the case. The same thing with respect to the defendant's opening statement.

Although the power isn't so frequently exercised, I do know of cases in which it has been exercised in the case of defendant's opening statement. I thought what Mr. Bromley was, in effect, making this morning was a kind of opening statement for the defendants. However, go ahead.

Judge GARRETT: Let me see if I understand it. 11849 You mean that this proffer of proof should be sworn to?

Mr. STEFFEN: Substantially that, your Honor; and I am merely raising it—

Judge GARRETT: And there should be an affidavit, if given the opportunity, that it would prove so and so.

Mr. STEFFEN: That is right, and I brought it up simply to the Court would see just the technical position that we are in.

Chief Justice STEPHENS: Just a minute. Let me send for the Rules of Civil Procedure. Maybe you have them here.

Mr. KNUFF: I have them here.

Chief Justice STEPHENS: I have them in my portfolio in the next room, but maybe you have them more convenient.

That is the old rule. "Rule 56:

"The adverse party, prior to the day of hearing, may serve opposing affidavits, but the judgment sought shall be rendered forthwith, if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law."

Proceed, Mr. Steffen. We will determine these matters later.

11850 Mr. STEFFEN: I want to make just one or two points. I am going to refer to one or two of the proffers for purpose of illustration. I will refer first to item 4. Item 4 reads:

"At all times the licensor was willing to license any one manufacturer without regard to whether or not a license was taken by any other manufacturer or manufacturers."

We stated that that came in the first category and presented no material issue. In other words, assuming that U. S. G. was willing to license all—in fact, we contend that they would not only license all but did license all of the manufacturers, and, therefore, we do not think that that really is very material, taking it as it is.

Now, the more important point that perhaps I should refer to is the matter of Proffer 1. Proffer 1 says:

"There was no agreement or understanding between the United States Gypsum Company * * *, patentee, and the other defendants or any of them that they would associate themselves in a plan to blanket the industry under patent licenses and stabilize prices or issue or cause to be issued substantially identical licenses to all of the defendants or any number of them."

Now, our position is, as we stated, I think, this morning, that what you have to show is brought out in the

11851 Masonite and in the Interstate Circuit case, that the parties have associated themselves, by way of

concert of action and being erstwhile competitors and covering the entire industry, in a plan or in a scheme or in a course of action—I said that many times this morning—the natural result of which is to result in restraint of trade.

This morning I clearly said, or tried to say, that for purposes of this action, this motion, we can limit our case to price control. The facts are admitted on that point alone.

The matter of whether or not these defendants did associate themselves in a plan, if you wish, to standardize or to stabilize prices throughout the industry is sufficient to make out a conspiracy in restraint of trade.

Price fixing alone is *per se* illegal.

The Supreme Court has said that this is not protected under the General Electric case. You have a combination. The plan—Of course, they never sit down and say, “Now, we will do it according to a particular plan.” The plan is what you find as the course of action, what they were doing: As Mr. Justice Jackson said, you infer from what they have done, and it gets so loud, the inference, where they have all fixed prices for a period of 19 years or some such matter, that you won’t hear them say, “Well, we didn’t have any plan to do what we did,” or as Mr. Justice

Hand said, “Monopolists do not monopolize unconsciously.” Those things, I think, are so clear that no evidence is in point.

Now, take this case. Mr. Bromley would call Mr. Avery. I don’t know what he would ask him, but in the case of licensing the whole industry he did fix prices throughout the whole industry. If he were to ask, “Well, did you have any plan to fix prices throughout the industry?”, what in the world would that do? Suppose he said, “No”, which is the most he could say, what in the world would it prove? They did fix prices throughout the industry, they did license the entire industry, they did get rid of jobbers—and that is admitted—they did all of the things that are not denied or not brought out in this proffer, such as to have dunnage, to have their various trucking areas, the size of trucks, and everything that has gone on—that is all admitted today. They have not offered in their proffer anything to controvert it.

Now, that is regimentation of an industry. All those admitted facts. Now, what can Mr. Avery say? He can say, “I had no plan.” It would be a stupid thing to have to listen to Mr. Avery say he had no plan. What difference would it make whether he had a plan when the whole

industry did do it? They all came in, and, moreover, Mr. Bromley admits they all knew they were coming in, in the summer of 1929. They talked over the licenses. At the May meeting they were handed out price control bulletins with all the details. They knew what the price control feature was, and that same feature came in, in 11853 November, the moment they got into the other licenses. They knew the regimenting scheme. They all came in.

I, therefore, say that under their Proffer No. 1 that Mr. Avery might testify that there was no agreement or understanding, is entirely immaterial.

You can say the same thing with his offer in regard to jobbers. He wants to show, he said, that they didn't intend to eliminate jobbers. Well, whether they intended to or not, they did.

He says he would be able to call the U. S. G. officers and have them tell what they intended to do. Well, the fact is they did eliminate jobbers.

He said he would like to ask them if it wasn't their lawful right to fix prices to jobbers the same as to dealers. Now, that raises the question of law: Was it their lawful right to do that in the circumstances of this case? We would say the Supreme Court has said "No", that where you have all associated together, you are all fixing prices to jobbers the same as to dealers with the effect of eliminating jobbers from an industry, that you have, at that point, as soon as you know that everybody is adhering to that same plan or course of action, a conspiracy which results in a restraint of trade, and it is illegal.

Now, perhaps should say one point with regard to the Line Material argument that we advance. I think 11854 that the argument is very clear.

Mr. Bromley says that it is not unlawful, that the illegality was in the acquisition of the two patents.

He points out: Suppose Haggerty had made a will and given the "starch" patent to U. S. G., would that have constituted an unlawful act?

Well, the vice in the Line Material case—and he read from the opinion—was that the manufacturers all combined under common license agreements to fix prices. The Sherman Act isn't directed and doesn't in terms say it is unlawful to take two patents and combine them. The Sherman Act says that it is unlawful to combine and fix prices, and the whole gist of the Line Material opinion was

to say, "And the G. E. case does not protect you where you have combined patents and are fixing prices beyond what they have said in the G. E. case."

11855 The Line Material case, therefore, is right on all fours with the Gypsum case as respects the combination of manufacturers, their taking out common licenses, their fixing prices, and so on; but the immunity they thought they would get under the G. E. case the court said was gone for the reason that the G. E. case nor no other opinion of the court had gone so far as to say that you could combine those two patents and then fix prices on the combined products.

They could, of course, not have made that point. They could have made the point that just the combination alone, as they said in the G. E. case, where you have regimented an entire industry, that the rewards go beyond anything you are entitled to have by virtue of your patent; but in the Line case, as we point out in our brief, they said the G. E. case is, moreover, also obviated by the fact that you combine competing patents, put them in the hands of one owner, and then fix prices on the basis of that.

There is no immunity by virtue of the G. E. case for that sort of combination. I think our record is pretty clear that the "starch" patent and the "foam" patents are competing. They say so right on their face. It makes a lightweight board. They were put in the hands of one manufacturer. The result is that they were fixing prices on the basis of a combination of products.

Now, in other words, what Mr. Justice Reed was
11856 doing and the majority was doing was saying that, "Well, granting that under the G. E. case the licensor may fix prices of his single licensee on a patent, if he has combined and obtained competing patents and then fixes prices on the two of them, that that goes beyond the G. E. case in itself."

The Gypsum case goes beyond the G. E. case if you regiment the whole industry.

The rewards are not normally and reasonably adapted, as the court very specifically says.

So that we feel there isn't really any disputed questions of fact or any genuine issue of a material fact in the case. There is no question at all that the provisions as to intent—you don't have to show, as the court has been saying for 30 or 40 years, that the defendant intended to do what they did. You don't have to show that they had a specific purpose to do what they did.

We say that when you come to show how a conspiracy is proven, you don't have to show they had any preliminary agreement whereby they did what they did.

Chief Justice STEPHENS: How can you show a Sherman Act conspiracy without showing intent? You don't have to have overt acts, as I remember it, under the Sherman Act.

Mr. STEFFEN: No.

Chief Justice STEPHENS: You have to have intent. Doesn't intent have to exist for conspiracy under the Sherman Act?

11857 Mr. STEFFEN: No, it is concerted action, and in the patent case, which as I recall was a series of coal contracts—maybe I have the Reading case and patent case mixed—but a series of contracts each of which individually was all right, but where they were combined then you had a monopoly or undue control over an area of the coal industry. The court said, "Well, whether they intended to get undue control over the industry or not is immaterial." They did get it.

As Mr. Justice Douglas in the Paramount case said, "If you had to go back and prove what after all is a mere matter of form where the real vice is what they did—"

Chief Justice STEPHENS: Of course, I read with great humility anything from my own opinion at this stage of the proceeding, but I said there among other things—for the convenience of the reporters I am reading from page 106 of the defendant's print of the opinion of the Trial Court in this case, page 451 of the Federal Government:

"Certain other principles relating to proof of such charges as are involved in the instant case should be stated: A conspiracy is a partnership in the accomplishment of an unlawful thing, or of a lawful thing by unlawful means"—citing authorities—"Under the Sherman Act a conspiracy need not involve an overt act, although the commission of such an act or acts may tend to characterize a conspiracy in respect of

11858 time and place. The Sherman Act punishes the conspiracies at which it is aimed on the common law footing—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability.'"

Then citations are given. To continue:

"As stated in the latter case 'Conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done and from the

circumstances.' Evidence as to conspiracy is, of course, to be considered as a whole—not piecemeal."

It is true, of course, that you may not be able to prove intent by direct evidence, but unless you are aiming at proving an effectuated conspiracy to condemn the overt acts which result from it, haven't you got somewhere in the ambit of your proof, either by direct proof or by inferential proof or circumstantial evidence, to show that there was an intent either to do a lawful thing by illegal means, or to do an unlawful thing?

Mr. STEFFEN: I don't want to be understood to say—

Judge JACKSON: Isn't it a kind of aphorism that everybody is presumed to intend the result of his own act?

Mr. STEFFEN: That is right, and will not be heard to say the contrary is what the court said.

Chief Justice STEPHENS: That is true, but still that doesn't eliminate the fact that you ultimately have
11859 to find intent, so that intent is still an issue in the case, isn't it? That goes to the method of proving intent.

Mr. STEFFEN: Well, your Honor, if they won't hear you say the contrary, then it is scarcely an issue in the case. I would cite you again in our brief the language of the court in the Griffith case, which I think is very clear:

"It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements * * *. To require a greater showing would cripple the Act. As stated in United States vs. Aluminum Company of America * * * 'no monopolist monopolizes unconscious of what he is doing.' Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act."

I have no further argument, your Honor.

Chief Justice STEPHENS: Mr. Bromley, I would like to hear you on this point that you are required in order to make a binding proffer to file an affidavit. What do you say about that?

Mr. BROMLEY: In the first place, the plaintiff's motion
11860 for summary judgment is made upon the pleadings and the proceedings, including the testimony and the exhibits of the admissions by counsel.

Now, my position was that since the Government has moved upon the testimony and the exhibits, that I wouldn't even have to make an offer of proof.

Chief Justice STEPHENS: Does it also move upon the pleadings, did I hear you say?

Mr. BROMLEY: Yes, sir.

Chief Justice STEPHENS: Very well.

Mr. BROMLEY: And that since they proffered to the Court both sides of the question, not only the complaints but the answers, not only the direct examination but the cross-examination, not only the testimony but the exhibits, and have proffered to the Court the whole thing, there was nothing for me to do except adopt the basis presented and say on the facts that they present thus as a matter of law the motion cannot be granted.

I didn't feel that I had to come in here and make an offer of proof supported by affidavit or make any showing by affidavit. I was willing to accede to the request that I do so in order to assist the Court in indicating what it was that I had in mind, but I felt I could have just as well indicated that on the argument without any offer of proof, that it was apparent from the nature of what the Government proffered here—that is, the testimony and the exhibits.

11861 Chief Justice STEPHENS: I want to ask you one other question, Mr. Bromley.

Turning to the Supreme Court opinion in the Gypsum case, at page 24 in the second paragraph the Court said:

"If the District Court had thought that a plan such as is evidenced by the license agreements and the bulletins was illegal under the Sherman Act, it might have had a different conclusion on the question of the admissibility of the declarations of some appellees against all. Its position stemmed logically from its understanding of *United States vs. General Electric Company*"—giving the citation.

Then it puts in a footnote, which is a quotation from my opinion for the Trial Court in the Gypsum case, which says:

"To the District Court, the General Electric case establishes 'that a patent license agreement granting the right to make, use and vend a patented product, under terms and conditions, including prices, fixed by the licensor, is lawful. Such a license agreement (ordinarily, and, when the prices are (as to the General Electric case) a part of the license contract, neces-

sarily, involves negotiation and discussion between the licensor and the licensee and agreement upon the terms and conditions, a purpose to execute and carry out the agreement, combined action in signing the agreement and in performing the obligations thereof, with knowledge that it will result in a stabilized and presumably profitable price for the patented product as between the parties and in the industry (since the parties are, by virtue of the patent, the only ones having a right to make, use and sell the superior patented product) and with knowledge that it will result in a monopoly (*i. e.*, a divided patent monopoly), in probable discontinuance of manufacture and sale by the licensee of inferior materials (the licensee's incentive to take a license is the right to make the superior product), and in control of distribution. What a lawful patent license agreement normally involves cannot be unlawful. Additionally, since a patent owner may lawfully divide his patent monopoly with a plurality of licensees, there will in the usual course be with each of such licensees the same negotiations and discussion, agreement upon terms, purpose to execute and carry out a license contract and to accomplish its normal results, and combined action in so doing, as in the case of a single licensee. And each licensee will be informed of and discuss with the licensor the terms and conditions of the proposed licenses; otherwise no more than a single license could be executed. A patent owner would not be able to license competing manufacturers upon different price terms; no one such would be willing to suffer competitive disadvantage; no one such would be willing to sign in the dark as to the terms to be extended to the others; ordinarily, moreover, there will be discussion at large, *i. e.*, within the trade, of the advantages and disadvantages of the licenses proposed by the patent owner. Each of a plurality of licensees will, moreover, have the same purpose to take a license and to secure its resulting advantages. The licensor and each licensee of such a plurality constitute "combination" to effectuate the purposes of their license. Since a plurality of licenses is lawful, all of this must be lawful. Further, if in practical effect the licensor and the plurality of licensees are a "combination" to the same end, such a "combination" is not stigmatized by the law—provided in purpose

and effect it does not secure to the patent owner more than the normal reward of a patent monopoly, nor to any of the licensees with whom the monopoly is divided more than the advantages which naturally result to a licensee, as well as to a licensor, from patent licensing. All of this necessarily follows from the General Electric case.' ”

Now, after having quoted that in its opinion, the Supreme Court goes on at the top of page 25 and says:

11864. “The opinions in No. 8, United States vs. Line Material Company, decided today, whatever may be the different views expressed, make clear that the District Court’s interpretation of General Electric differs from that of this Court. With its interpretation of the rule of General Electric, the District Court was not required to balance the privileges of United States Gypsum and its licensees under the patent grants with the prohibitions of the Sherman Act against combinations and attempts to monopolize. Conspiracies to control prices and distribution, such as we have here, we believe to be beyond any patent privilege.”

Now, why is not that an express holding by the Supreme Court that a plurality of licenses, a mere plurality of licenses, is illegal, with price-fixing provisions? That has puzzled me in reading this opinion, especially when I contrasted it with what you yourself have emphasized. The Supreme Court said in a later part of the opinion at page 27:

“The Trial Court made findings of fact which if accurate would bar a reversal of its order. In Finding 118 the Trial Court found that the evidence ‘fails to establish that the defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices.’ ”

Those two parts of the opinion seem to be inconsistent with each other. In the one which I first
11865 read, it seems arguable that the Supreme Court was holding that a plurality of licenses is illegal, but here the Supreme Court says that if our findings were accurate—and it mentioned particularly Finding 118—the reversal of its order would be barred, which would seem to indicate that a plurality of licenses is not illegal.

What do you make of that? Can you help us, either of you?

Mr. BROMLEY: I had always interpreted the statement on page 24 as merely the enunciation of the doctrine that the license agreements and the bulletins were sufficient *prima facie* proof to justify the reception of the admissions against everybody.

I have also thought that the sentence on page 25 misinterpreted what was stated in this Court's opinion completely because I saw no evidence of any failure to appreciate that the privileges must be balanced with a proper regard for the Sherman Act and the patent law.

Chief Justice STEPHENS: Well, that is certainly true because we carefully pointed out that the operations under the agreement must not go beyond the proper limits of the patent monopoly and into the field covered by the Sherman Act, and we thought that they had not.

Mr. BROMLEY: Furthermore, I think you expressly refer to the fact that you had conflict and had to balance what could be done under the one and what was prohibited under the other.

Chief Justice STEPHENS: Do you agree with me that those two parts of the opinion that I have referred you to are apparently inconsistent, when it says, "In Finding 118 the Trial Court found that the evidence 'fails to establish that the defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices' "?

When the Supreme Court says that and says that if we could make a different finding on that subject accurately, it would bar reversal, it means to hold that a mere plurality of licenses is not necessarily illegal?

Mr. BROMLEY: Yes, sir, and I think also you cannot disregard what is said on page 34 and page 35, at the bottom of 34, where I said before and say again that I think they there state what they think the conspiracy was that was established *prima facie*.

May it please the Court, going back to page 24, that sentence, "If the District Court had thought that a plan such as is evidenced by the license agreements and the bulletins was illegal under the Sherman Act, it might have had a different conclusion on the question of the admissibility of the declarations * * *", that is what they are talking about—admissibility of declarations.

Now, I confess that I have always thought that it was clear law that in order to make declarations admissible, you didn't have to prove an unlawful conspiracy by evidence *aliunde*, and I say that because as

I understand the Hitchman case—and I can't remember now whether your Honor accepted this in the opinion or not—as I understand the Hitchman case, it was sufficient to prove that there was a combination that is, to organize the mines.

Chief Justice STEPHENS: We did hold in addition to that that you couldn't prove one combination and then, resting upon that, prove something different by way of the full conspiracy.

Mr. BROMLEY: By means of the declarations.

Chief Justice STEPHENS: By means of the declarations.

Mr. BROMLEY: I think that is right.

Chief Justice STEPHENS: I do think it is to be noted, gentlemen, that in this part of the opinion on page 24 the Supreme Court was talking in terms of whether or not there had been established sufficient evidence of a conspiracy independently of the declarations to warrant considering the declarations binding upon all. Perhaps, therefore, the Supreme Court was not intending there to rule definitively upon a question of the legality of plurality of licenses.

Mr. BROMLEY: I think that must be the explanation.

Chief Justice STEPHENS: Mr. Steffen, do you have anything that will help?

Mr. STEFFEN: I would like to say just a word. I think there is no necessary inconsistency at all in the two provisions and with the greatest respect I say that I think the Supreme Court when it set out very carefully the theory upon which this Court construed the General Electric case and said that it disagreed with it, was passing then definitely upon the law of the case. Of course, it would have to do that for purposes of determining the effect of the declarations.

But what they were saying was that even though all of the matters that were listed in this footnote were found, still that that doesn't reach the position of this Court and that this Court says that the conspiracies to control prices and distribution such as we have here—or, in other words, such as your Honor had listed—we believe to be beyond any patent privilege.

Now, when you come to four over on page 27, the Trial Court made findings of fact which, if accurate, would bar a reversal of its order, and referring to Finding 118, I don't see any inconsistency. If you read Finding 118, it is as broad as all outdoors, and if that finding were to remain—that is, that there was no combination among erstwhile competitors—let me read it:

“ * * * the evidence ‘fails to establish that the defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize 11869 prices as charged by the Government.’ ”

You see, that is extremely broad. It had to be upset. That is, if the Court was to do anything at all. The Court in this part of the opinion is merely explaining how your Honors reached the position that you did and saying they disagreed with the basis on which you reached it and then saying that as they looked at the evidence that 118 can't be sustained.

That cleared the path then for them to say in the fifth part of their opinion over on page 33 what they thought the law was, and then they rather explicitly say there that it will be sufficient to show that defendants, and so on, as I see it.

Chief Justice STEPHENS: We will take a recess for ten minutes, gentlemen, and reconvene and, if possible, make some announcement as to when we can reach a conclusion upon this motion for summary judgment.

(Recess: 4:27 p. m. to 4:47 p. m.)

Chief Justice STEPHENS: The Court thinks it need give no further consideration to the motion for summary judgment than it has thus far given. It has heard the arguments and considered them carefully and has read the proffers and various other papers presented and is ready now to reach a decision.

The Court is in division on the motion for summary judgment. Judge Garrett and Judge Jackson 11870 have different views from those of myself, and I will ask them each to state briefly their views; and then I will state mine.

Judge GARRETT.

Judge GARRETT: I have studied the proffers of proof very carefully in the light of the motion for summary judgment and in the light of the argument made in the briefs.

It is my opinion that if everything should be testified to, which is in the proffers of proof, it would not bring any change in the decision of the Supreme Court on the fundamental question involved.

I do not care to go into any detail about the matter. Of course it is very well known my judgment was different originally, but the Supreme Court has spoken, and I am unable to see wherein there is any loophole through which there may be a conclusion different from that reached by the Supreme Court upon the fundamental questions.

Hence, I think the summary judgment should be granted, but I take the precaution to say that the decree following the summary judgment, if it comes or when it does come, must be examined with great care because it should not include matters which were not in issue before the Supreme Court.

That, I think, is all that I have to say.

Chief Justice STEPHENS: Judge Jackson:

Judge JACKSON: Judge Garrett's reasoning paragraph 11871 allels mine. I, too, feel that if everything were proved by witnesses on the stand that is stated would be attempted to be proved in the proffer of proof, that still there would be no genuine issue of a material fact. There is no sense in going to great length to explain my view. I agree with Judge Garrett. I have read very carefully the briefs, listened with attention and an open mind to the arguments, but I just can't understand how I could come to any other conclusion in view of the decision of the Supreme Court.

Chief Justice STEPHENS: I have a different view from my colleagues. I think the same issues—genuine issues of fact—which were in the case at the outset are still in the case—the issues which arise from paragraphs 44, 45 and 46 of the plaintiff's complaint and from the defendant's answers denying the allegations therein.

I think the opinion of the Supreme Court clearly contemplates further proceedings in this case. It says on page 33 of the slip opinion just above Topic V:

"It may be that in the light of this opinion the District Court will conclude that many such findings are no longer significant in reaching its decision. As to others a different result will be required. Enough has been said as to the findings and the evidence, we think, to enable the District Court to pass upon the facts that may come before it on further proceedings
11872 in accord with our present ruling."

That, I think, is a clear indication by the Supreme Court that further proceedings were contemplated by it to be held by the Trial Court.

As to the balance of the opinion of the Supreme Court, while it is difficult to be clear as to just what it means on the topic of legality or illegality of a plurality of licenses, I cannot bring myself to believe in reading the opinion several times carefully that the Supreme Court has intended to rule that a mere plurality of licenses with price-fixing provisions is illegal.

I think, therefore, that the Supreme Court would not warrant our denying the defendants a right to try to prove that that was all there was in the instant case.

I do not see how we can assume to say that the defendants will not be able to prove to the satisfaction of this court the correctness of the findings of fact which it has already made. Putting this otherwise, I think the whole of the opinion in the Supreme Court must be read in the light of the proposition that the Supreme Court was passing only upon the question whether or not a *prima facie* case had been made.

I do not think it intended to rule that a complete case had been made. If so, it would itself have ordered a decree. I think the defendants are entitled to try by introducing evidence to convince the triers of fact that the allegations in paragraphs 44, 45 and 46 of the complaint are not true.

I think that to grant summary judgment at the present stage of the case is to deny to the defendants the guarantee of the due process clause of the Constitution of their day in court on the issues raised by their answers.

I do not think the Supreme Court contemplates any such denial.

That states my views briefly.

With respect to a decree, since I am now in the minority, I shall have to defer to the views of my fellows as to this suggestion.

It occurs to me, Mr. Steffen, in view of the victory you have now so fully won, that you might be able to content yourself with a decree which reflects the views of my colleagues on the subject of conspiracy to execute and take patent licenses for the purpose of organizing the industry and stabilizing prices, and on the subject of monopoly, and that you might not need to trouble yourselves or this court with the difficulties about jobbers and high prices and arbitrary prices of the patented board or with respect to unpatented materials or with respect to standardization or with respect to manufacturing distributors.

I should think you might be able to waive those points, if you get a decree, which you will now get, holding the entire licensing system illegal.

11874 Now, of course, we can't compel you to do that, but I suggest that as a matter for your consideration; and if you come to a different conclusion, then I think my colleagues will have to meet the issue of how they are going to draw a decree on those five topics which are the

subject of paragraph 45 of the complaint without a hearing granted to the defendants on their denials of the charges on those subjects.

Mr. STEFFEN: If your Honors please, we will be glad to have possibly 90 days in which to study over the matter of the findings and also to take up in some measure the nature of the proposed decree. We do not want to hurry in this, and we would not like to be pressed to agree now to any particular findings, but after studying it thoroughly, we will then, as in the last case, submit—

Chief Justice STEPHENS: I wouldn't suggest a present commitment, of course. I do have this to suggest: while I disagree with my colleagues in their views, I think one of the practical results of their views, which may be desirable, is that if the defendants see fit, as I assume they will, to appeal from this ruling, we then may get a speed determination by the Supreme Court as to what this opinion means on the subject of plurality of licenses and the legality thereof.

It would seem to me that it would be to the interest of the Government, which wants to stop what it claims 11875 to be an illegal combination, to get its decree in here as soon as possible so that the defendants can proceed to appeal as soon as possible.

So I would suggest that you take as little time as is reasonably necessary for preparing a proposed decree.

Judge JACKSON: Be sure that time is sufficiently long, though, so that some of us Judges can get out of this climate. I am not going to work this summer if I can help it. I am sick of it.

Mr. STEFFEN: We want at least 90 days.

Chief Justice STEPHENS: Is there any objection to 90 days for the preparation of the proposed decree, any objection by the defendants?

Mr. STEFFEN: Mr. Knuff says he would prefer 120 days. I might say this: that I am in charge of a case in New York against the Investment Bankers. I come here occasionally, and Mr. Knuff has been carrying the load and it will be largely his load over the summer.

Judge JACKSON: Let us not fix a definite date, then, but get it out as conveniently as you can without killing yourselves, but have it accurate.

Mr. STEFFEN: That is right.

Chief Justice STEPHENS: It seems to me it would be better to set some time limit. If the defendants do not ob-

ject, let's make it 120 days. Any objection by the
11876 defendants to 120 days?

Mr. BROMLEY: No, your Honor.

Chief Justice STEPHENS: Make it 120 days from today to present the proposed decree to the court and to adverse counsel.

Mr. STEFFEN: That is proposed findings of fact.

Chief Justice STEPHENS: Proposed findings of fact, decree, or any other papers you feel you are obliged to have signed by the majority of the court under this motion for summary judgment and the granting thereof.

Does anyone think of anything else that ought to be disposed of at this time?

Mr. BROMLEY: May I have the last thing read that you said, Judge? I wasn't listening, I am sorry.

Chief Justice STEPHENS: I said that the defendants not objecting, the Government would be allowed 120 days from today within which to file with the Court and serve upon the defendants and their counsel its proposed decree, findings of fact, and/or other papers which it may feel itself under the legal duty of presenting in order to effectuate the ruling of the Court on the motion for summary judgment.

Mr. BROMLEY: I should like the record to show that I except to the ruling of the Court made this day.

Chief Justice STEPHENS: May it so show.

The court will be in recess until 120 days.

11877 (Whereupon, at 5:00 o'clock p. m. an adjournment was taken *sine die*.)

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11904 In the District Court of the United States
For the District of Columbia
Holding a Three Judge Court

UNITED STATES OF AMERICA,
PLAINTIFF,

V.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; HENRY J. HARTLEY, FREDERICK G. EBSARY; and FREDERICK TOMKINS,

DEFENDANTS.

Civil Action No. 8017.

Court Room,

U. S. Court of Customs and Patent Appeals,
Washington, D. C.

Monday, June 13, 1949.

The above-entitled cause came on for oral argument upon the proposed findings of fact, conclusions of law, and decree, at 10:00 a. m., pursuant to notice, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

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11906

PROCEEDINGS

Chief Judge STEPHENS: The court is in session for the purpose of hearing argument on the proposed findings of fact and conclusions of law and decree to be entered upon a summary judgment, which by a majority vote of this court was to be entered in this case.

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11907 *Opening Argument on Behalf of the Plaintiff By Mr. KNUFF.*

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11915 Judge GARRETT: I will ask you to go back for a moment there. The statement of the Supreme Court there is: "The Government introduced evidence

tending to show that the price," and so on. Did they make a finding or draw an inference from that?

Mr. KNUFF: To this extent, they did. Toward the end of the opinion the Supreme Court said:

"The General Electric case affords no cloak for the course of conduct revealed in the voluminous record in this case. That case gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed * * *"

So I would say that the Supreme Court did say that unpatented products were suppressed.

Chief Judge STEPHENS: What it said, to be a little more exact, was this: There was a *prima facie* evidence showing that suppression.

11916 Mr. KNUFF: That is right. Now, there has not been introduced in this case any other evidence which was before the court. So, therefore, we take the position that that *prima facie* case now becomes conclusive.

Chief Judge STEPHENS: That raises a point which, although I am in a dissenting position in this case, I think I ought to ask you something about; and that is the rather startling position for the Government to take, one which comes as a surprise to me—you contend, do you, that the opinion of the Supreme Court is now binding conclusively on all statemnets which it made in respect to the *prima facie* case?

Mr. KNUFF: I do, your Honor. There is nothing before the court other than what was before the Supreme Court.

Chief Judge STEPHENS: I thought my colleagues entered their summary judgment upon the theory that there was nothing before the court but an issue of law under Rule 56.

Mr. KNUFF: There was an issue of law before them, and that issue of law was that there was no genuine issue of fact as to any material matter.

Now, the material matters that were before the court concerned the raising of prices, the standardization of product, and the court, after taking into consideration what the Supreme Court said and after taking into consideration what the defendants proposed to prove by their proffer, the court said that even assuming everything that
11917 the defendants said they would prove would be proved, still, that would not alter what the Supreme Court has said.

Judge GARRETT: Insofar as the Supreme Court had spoken upon any material question of fact or of law.

Mr. KNUFF: That is right.

Judge GARRETT: At least, I think that is what we meant.

Mr. KNUFF: I think that is the position your Honors took.

Chief Judge STEPHENS: Do you take the position that even if you had not made a motion for summary judgment, that under the opinion of the Supreme Court the defendants would not have been entitled to any day in court on any question of fact?

Mr. KNUFF: I will come to that later when I compare what would have happened if we had not made the motion for summary judgment with what actually has happened in this case. I would like to defer answering that question until I come to that portion of my argument.

11926 Chief Judge STEPHENS: Mr. Knuff, in the interest of saving time, what difference does it make what counsel on either side of the case expected of the court? The question before us is: What ought the court decide? Ought we grant a judgment on the
11927 whole case or ought we just grant it on those undisputed issues which were the foundation, as I understood it, of my colleagues' summary judgment?

Mr. KNUFF: Well, if you do not grant it upon the whole case, then I think that this court will have to comply with the provisions of Rule 56 (d) and hold further hearings on this case.

Chief Judge STEPHENS: Well, I cannot understand why we had so much misunderstanding in the case. I had thought that this summary judgment proceeding arose as follows. It is all in the transcript, which I reviewed last night with some care.

After the mandate of the Supreme Court came down, counsel and the court met here, and the Government suggested a so-called pre-trial or mid-trial hearing for a definition of what further issues remained in the case in view of the Supreme Court's opinion and for a statement or an order by the court as to what further evidence the defendants would be permitted to introduce.

The defendants objected to a pre-trial hearing or a mid-trial hearing and suggested that, on the contrary, if there were some dispute between the parties as to what further evidence might be introduced, in view of the Supreme Court opinion, that interrogatories be served upon them.

In the course of that colloquy it was indicated by Mr. Bromley, then counsel for the Gypsum Company, that the Government had been contemplating a motion for 11928 summary judgment, and that the Government admitted.

In the course of further conference and informal discussion between court and counsel, it developed that there was a good deal of confusion in the minds of all of us as to what the reach of the Supreme Court opinion really was, as to how far it went. It was indicated that it would be desirable for this court to express itself on that subject in order that counsel on both sides might be advised as to what further proceedings there would be.

We indicated, however, from the bench that there was nothing before us to rule upon. Finally, in the interest of what seemed fairness to all concerned, in order to get something before the court to rule upon, it was suggested that you make a motion for summary judgment, based upon the rule which provides that where there is no genuine issue as to any material fact, a summary judgment can be entered.

We, for the purpose suggested, said that we would entertain a summary judgment, a motion for summary judgment.

You, of course, were not compelled to make such a motion. But you did make it and you argued it, and with vigor, and the defendants resisted it. As I understood the whole argument in favor of the proposed summary judgment and the argument against it, it came down to the single proposition that the Government contended that the Supreme Court had ruled in its reversal of our decision that a mere 11929 plurality of patent license agreements, industry-wide, with price fixing provisions adhered to by the parties was *ipso facto* illegal and, there being no dispute in the case—so it was contended—that there was such an industry-wide price fixing arrangement, that was the end of the matter and the case should, therefore, be terminated by a summary judgment limited to that one undisputed question.

Now, I understood that my colleagues reached the conclusion when they granted Government's motion for summary judgment, that the Supreme Court had so ruled; and I stated in a brief oral dissent that I thought it had not so ruled and, therefore, I did not agree that summary judgment could be entered.

So I thought that the action of the court, as far as the majority was concerned, in granting the motion for sum-

mary judgment was merely that a majority of the court—my two colleagues—thought that the Supreme Court had ruled that a mere plurality of patent licenses with price fixing provisions, industry-wide-adhered to by the parties was *ipso facto* illegal; and, therefore, the Government was entitled to a summary judgment because there was no dispute in respect to that question.

I thought that the Supreme Court had not so held, that if it had so held, it would have ordered a summary judgment entered itself and ended the case, and that because it had sent the case back for further proceeding, what it meant was that there must be something more than a mere plurality of patent licenses, there must be some 11930 action in concert or some plan or some conspiratorial purpose to violate the Sherman Act, and that the defendants, as I read the Supreme Court's decision, were entitled to further proceedings in order to try and rebut the *prima facie* case of the Government, which the Supreme Court said had been made in respect of the charges of the Government, that there was a plan, a conspiracy, to violate the Sherman Act through the execution of sham licenses and with a general improper purpose to stabilize prices and eliminate competitors and standarize board, and the like.

I thought that was the posture the case had taken at the time we entered the summary judgment, and I think that is the view my colleagues had when they entered their summary judgment.

Now you are asking the court, apparently, to go far beyond that and to conclude that the Supreme Court meant that the case had been decided by it without reference to any evidence which the defendants might introduce and that, therefore, we must enter a decree as if the whole case had been completely tried.

I make this extended statement in order to clarify, if I can, what is before us, because it seems to me that you are now not arguing what form of decree should be entered, but you are re-arguing the question as to what was done by the court when it entered its summary judgment.

Mr. KNUFF: I have to re-argue that because—

Judge JACKSON: May I interrupt you a minute, Mr. Knuff?

Mr. KNUFF: Certainly.

11931 Judge JACKSON: Of course, you will recall that at the time the motion for summary judgment was made, Mr. Bromley, on behalf of all the defendants, made a

proffer of proof as to what facts would be brought out on the stand if the case was continued for further evidence.

Mr. KNUFF: That is right.

Judge JACKSON: I, for one of the majority—and I assume my colleague, Judge Garrett, thought the same way about it—felt that if he proved everything he was going to prove, that it would make no difference.

Mr. KNUFF: That is right.

Chief Judge STEPHENS: I neglected to say also the court required the defendants to make a proffer, which they did, at the same time you made your motion for summary judgment.

Mr. KNUFF: I think the court requested the defendants to make a proffer, I don't know whether the court required them to do so.

Judge JACKSON: It does not matter whether it was required or requested. It was done.

Chief Judge STEPHENS: As to the word "required", I accept your amendment. Thank you Mr. Knuff. The court did not require anything of either side. The court suggested and requested these items. Counsel were not compelled to make a proffer. If they wished not to do so, they need not have done so. You were not compelled to make a motion for summary judgment.

Mr. KNUFF: That is right.

11932 Chief Judge STEPHENS: The whole matter was a friendly and cooperative arrangement, as we understood it, in order to get a ruling from this court as to what the Supreme Court opinion meant.

Judge GARRETT: I cannot see where there could be a misunderstanding about this matter, although evidently there was. In regard to what you read from the record on page 8 of your memorandum beginning with the quotation of the Supreme Court, certainly, Mr. Steffen indicated, and indicated clearly, that the matter of dunnage and freights and all of that was not necessary, that the Government had a case without that, and the majority of this court agreed with that and gave summary judgment based upon that theory.

Now, there is complaint here, a complaint was made that the parties should be permitted to introduce testimony. We did not feel that any testimony was necessary. Where the Supreme Court had specifically found facts and applied law to the facts, certainly, there was no necessity for it. We cannot grant a new trial of a case that the Supreme Court has decided.

Now, apparently you seek to bring in here and have embodied in this decree questions which at that very time it was stated were unnecessary to the summary judgment. I do not understand it, Mr. Knuff. It makes it hard. It makes it intensely hard on a court to have to be called on—you are entitled to a decree. If you draw a decree
11933 in conformity with the decision of the Supreme Court of the United States, you are entitled to it, of course, and this court will cause it to be entered, because that becomes part of the duty of this court.

But to undertake to make us reconsider here a lot of questions that the Supreme Court did not decide, I just do not understand that. It worries me.

Mr. KNUFF: May I reply to what your Honor has said?

Judge GARRETT: Certainly.

Mr. KNUFF: When Mr. Steffen answered your question, you must take into consideration that Mr. Steffen answered that in the light of saying that he was not waiving anything in this case.

Judge GARRETT: Oh, certainly.

Mr. KNUFF: You must take into consideration the context of our brief. We ask the court not to take one isolated statement by which the court now feels Mr. Steffen waived something. We ask the court not to take the one isolated statement and disregard everything else that Mr. Steffen said. Read that statement of Mr. Steffen in context with the brief. Read it in context with what he said in the subsequent portion of his argument. Do not take one statement that Mr. Steffen said—and I do not think even that statement goes as far as Judge Garrett indicates—but do not take one isolated statement and say the court is now going to decide this case upon that statement. Take the statement in conjunction with everything that we said.

11934 Judge GARRETT: Now, let's see. I read again Mr. Steffen's statement made at that time. I would say this:

For the purposes of a motion for summary judgment and for the purposes of the Supreme Court's opinion it is not essential to show all of those violations, referring back to dunnage and freights, and so on—"if you have shown price control alone, you have a case".

Now, we thought Mr. Steffen correctly stated the law and so proceeded.

Chief Judge STEPHENS: I may add this before you reply, Mr. Knuff. What I thought Mr. Steffen meant and what I

thought we had a reasonable right to conclude from his argument was that if we entered a summary judgment or if the majority, as it has now, had entered the summary judgment on the theory that a mere plurality of price fixing licenses, adhered to by the parties was without more, irrespective of any plan or conspiratorial intent to violate the Sherman Act illegal; if the court thought that was what the Supreme Court's opinion meant and entered a summary judgment upon that theory, I thought that was enough to satisfy the Government as far as summary judgment was concerned; but that if it should turn out upon a review of the summary judgment when entered that the Supreme Court had not held that a mere plurality of patent licenses with price fixing provisions without more was illegal, then, of course, the Government would not waive its right 11935 in a further trial of the case to have disposition of it in the manner in which it contends it should be disposed on the other issues of fact.

Mr. KNUFF: Look what Mr. Steffen said at that time:

"For the purposes of 'a'—not 'this'—'for the purposes of a summary judgment and for the purposes of the Supreme Court's opinion, it isn't essential.'"

We could have moved on that basis and moved on that basis alone, but we did not. Our motion says that we are asking for summary judgment upon the whole case. We could have thrown everything out the window that the Supreme Court had given us on the opinion and we could have moved for summary judgment on the basis of a plurality of licenses constituted a violation of the Sherman Act. We could have done that. We did not do it. We moved for summary judgment upon the whole case.

Chief Judge STEPHENS: Well, it seems to me that we are wasting time. Of course, I am only the moderator here. I am in a dissenting position. You are entitled to make any argument within a reasonable length of time that you wish to make. You are not restricted in that respect.

The question before us is not what you moved for, the question is what you are entitled to. That is what the majority has to decide, the kind of decree. You have got your motion for summary judgment granted. The question before us now or before the majority now is whether or not, first, findings of fact and conclusions of law should 11936 be entered, and, second, what should be the terms of a decree?

Mr. KNUFF: Yes.

Chief Judge STEPHENS: It may enlighten us, of course, to know what you contended and, of course, if we had a complete misunderstanding of all the Government was asking for, we ought to know it, and you are free to attempt to correct our view in that respect; but please bear in mind in view of the very large number of counsel that have to argue here that what is really before us is whether or not we should enter findings of fact and conclusions of law and what form the decree should take.

Mr. KNUFF: Well, I think that is all that is before the court, but in order to take up the form of what the findings of facts should be, it is necessary first to determine what the scope of our motion was.

Judge JACKSON: Why do you not assume that the court has its own understanding of what that scope is? We have had plenty of oral argument and we have had plenty of briefing on that, Mr. Knuff. Assume that we know.

Mr. KNUFF: All right, sir. Mr. Steffen asks if we could have a recess at this time.

Chief Judge STEPHENS: We will take a recess for fifteen minutes.

11937 Chief Judge STEPHENS: Proceed.

Mr. KNUFF: May it please the court, I shall pass immediately to the proposition that the court should make findings of fact. Although Rule 52(a) of the Federal Rules of Civil Procedure says that on motions for summary judgment, findings of fact are not necessary, nevertheless in cases like this one, courts have recognized that the findings of fact are desirable.

So, in our memorandum we quote from the Prudential Insurance Company case, and we also quote from the Saginaw Broadcasting case which was decided here in the District.

There is a later opinion of the Court of Appeals which the defendants cite in their brief, the case of Berma v. Lenkin, reported at 159 Fed. 2nd, at 827. That case also was one in which a motion for summary judgment was interposed and Judge Groner, in deciding that case, said this:

"We think it is always desirable that the facts should be found to aid us."

There are no reported cases in the books where the facts exactly parallel the situation which we have in this case, but the Associated Press case is sufficiently similar to the facts in this case that this court can conclude that that case

is of persuasive enough authority to warrant this court in adopting the procedure that was used in that case.

The Associated Press case, like this case, was a civil anti-trust action brought in the Southern District of New York.

11938 Judge JACKSON: That is cited in your brief?

Mr. KNUFF: That is cited in my brief.

(continuing) - in which the Government charged the defendants therein with violating sections 1 and 2 of the Sherman Act. That case, like this one, was tried before a statutory three-judge court.

After the answers were filed, the report of the case indicates that much testimony was taken in the form of interrogatories, admissions under Rule 36, examination before trial, and affidavits.

There, as in this case, the Government moved for summary judgment and that motion was granted.

The opinion of the case was rendered on October 6th, 1943, and in the opinion the court says this:

"The plaintiff will submit proposed findings and a proposed judgment and will serve the same upon the defendants, who will submit any substitute they may wish within thirty days thereafter."

Thereafter, on January 13, 1944, the District Court made findings of fact and conclusions of law, and the place where they are reported is indicated in our memorandum.

We take the position that this case has been tried upon the facts within the meaning of Rule 52(a). Rule 52(a) says that in all cases tried upon the facts, the court shall find the facts specially and state its conclusions of law. The circumstances under which this came before this court for decision are such that this court can say that the case has been tried upon the facts.

"The instant case," said the opinion of the District Court, "came on for trial on November the 15th, 1943, and continued thereafter for some sixty-six trial days."

The testimony of some twenty-eight witnesses was heard before the court. Six hundred and forty-one exhibits were received in evidence. At the conclusion of the Government's case, the defendant made a motion to dismiss that was orally argued and the motion was granted. Thereafter, the Government perfected an appeal to the Supreme Court and the Supreme Court on March 8, 1947, reversed this court. Thereafter, on June 7th, as Judge Stephens indi-

cated earlier; a conference was held and Judge Stephens stated what took place at that conference.

Now, it is our position that the posture that this case has assumed is such that it requires findings of fact to be made.

If you will stop one moment to consider what would have happened if no motion for summary judgment had been made, and then consider what has happened because a motion for summary judgment has been made, I think that you will find that there is no material difference between the two procedures.

Judge GARRETT: May I ask you a question?

Mr. KNUFF: Certainly, sir.

Judge GARRETT: Findings of fact should be made
11940 upon questions upon which the Supreme Court did not make findings of fact, is that right?

Mr. KNUFF: Yes, your Honor, under the posture of this case.

Judge GARRETT: Then, you would not expect this court to find facts not passed upon and not found by the Supreme Court and which were challenged in the proffers of proof to be passed upon, without opening this whole question again for that proof?

Mr. KNUFF: If your Honor pleases, the Supreme Court could not have made any findings of fact when this case was before it. The Supreme Court did not know what was going to happen after the reversal. The Supreme Court did not know whether or not the defendants were going to deny the execution of the patent license agreements. The Supreme Court could not know what was going to happen when it came time for the defendants to put in their case. Therefore, the Supreme Court could not make any findings of fact that would be conclusive. All that the Supreme Court could say was that "On the facts before us, the record is clear that the Sherman Act has been violated."

It may be, as far as the Supreme Court knew, that these defendants were going to deny the issuance of the licenses, of the bulletins, that they were going to deny the execution of the license agreements—

Chief Judge STEPHENS: How could that possibly be, when they had admitted that in their pleadings?

11941 Mr. KNUFF: The Supreme Court couldn't tell what the defendants would do.

Chief Judge STEPHENS: The defendants are bound by their pleadings.

Mr. KNUFF: That is right.

Chief Judge STEPHENS: And in the pleadings they admitted the execution of the patent licenses and sending out of the bulletins.

Mr. KNUFF: That is right; but the Supreme Court could not tell what position the defendants would take subsequently in this case. They could have denied even that there were any patents, so the Supreme Court could not make any findings of fact.

Chief Judge STEPHENS: They could not do that without stultifying their own pleadings.

Mr. KNUFF: I grant you that.

Chief Judge STEPHENS: It is not understandable that the defendants file, before a federal court, a solemn sworn answer, admitting the execution of the patent license agreements, and sending out the bulletins, and then turn around, in their own case, and deny it.

Mr. KNUFF: The Supreme Court couldn't tell what they were going to do.

Chief Judge STEPHENS: They are bound by their pleadings just as much as the Government would be.

11942 Mr. KNUFF: That is true, but the Supreme Court could not tell what the defendants were going to do—

Chief Judge STEPHENS: Proceed.

Judge JACKSON: They could not tell what evidence the defendants might have that they wanted to submit.

Mr. KNUFF: That is right.

I was talking about what would have happened if we had not made any motion, and what actually has happened. I was going to compare what would have happened if no motion had been made. This case would have been set down for the taking of defense testimony.

It can be assumed that when the witness was called to testify, that the government then would have asked the attorney calling the witness for an offer of proof that he proposed to adduce by the witness on the stand. It can be further assumed that the attorney would have stated that he proposed to prove, by the witness on the stand, one or more of the matters which were filed as a part of the proffer. It can be further assumed that the government would object to that offer of proof.

Now, in view of the action taken by this court on June 29, it can be assumed that that objection made by the Government would be sustained.

Now, this piecemeal calling of witnesses, requests for an offer, the offer, the objections, the sustaining of the

11943 objections, would go on and on until the defendants had exhausted the entire witness list that they intended to call to establish the total of their proffers.

When their witness list was exhausted, they necessarily would have been required to rest their case; and yet, there would not have been before this court any defense testimony.

In such a situation, I submit no one would argue that the case has not been tried upon the facts.

Now, the only difference between what would have been done and what actually has been done is this: We, by our motion for summary judgment, have brought before this court, promptly and collectively, everything that the defendants would have brought before this court by their piecemeal calling of witnesses.

If, on the one hand, it is conceded that the calling of witnesses and the offers and the objections would constitute a trial upon the facts, then certainly under this more efficient method of disposing of those legal questions, a holding that that does not constitute a trial upon the facts seems to me to involve a very unrealistic appreciation of what is meant by the phrase "tried upon the facts."

But the question whether or not findings of fact now should be made cannot be determined by the Rules of Civil Procedure alone.

Judge GARRETT: May I interrupt you a moment?

Mr. KNUFF: Certainly, sir.

Judge GARRETT: The Supreme Court made findings of fact. It reversed this court on findings of fact.

Why can you not take the decision of the Supreme Court of the United States and draw a decree?

Now, you want to come back here and have us try it, and try it again. Here is the case. Here is the decision. Why cannot the government draw a decree in conformity with this opinion of the Supreme Court of the United States? They have passed on the facts. All that they regarded as material to be passed upon, has been passed upon.

Why is it that we have to just worry and worry our lives out about this matter?

Here, the Supreme Court has spoken. That is the law, so far as courts are concerned, and so far as citizens are concerned.

Why can you not just take that opinion and draw a decree from it? It was not sent back to us to draw a decree. It was reversed and remanded for consideration in conformity with this opinion. I think that is the way it is expressed.

Mr. KNUFF: That is right.

Judge GARRETT: Now, why do you not take that opinion and draw a decree here and let us get rid of this? Why do you persist in bringing into this matters which we did not decide and which the Supreme Court apparently did not decide? You had better look at the decree carefully and see, I mean.

You are entitled to draw the inferences that the
11945 Supreme Court drew from certain facts, I think, in
formulating your decree; but, it is not now an issue here between the government and the defendant. It is an issue, I guess, between what the Supreme Court decided and what we decided. I have read, of course, not all of these briefs, I have not had the time, and perhaps I am anticipating counsel for defense somewhat, but why can you not take that opinion, why can you not get together and take that opinion and draw a decree in conformity with us and let us decide this case and get rid of it?

Mr. KNUFF: May I answer your Honor?

In the first place the Supreme Court did not make any findings of fact. This case may go back—

Judge GARRETT: They reversed. Of course you know what I mean. They reversed this court upon the facts, or at least upon inferences drawn from the facts.

I venture to say, here, now, that I do not believe a more careful opinion in a case of this magnitude was ever prepared than that prepared by the presiding judge of this three judge court. Every minutia was gone into.

The Supreme Court reversed upon certain phases of that opinion. The reversal was sufficient to give the Government a decree.

Judge Jackson and I thought that, within the limits of the decision of the Supreme Court, that decree should of course be granted and that nothing that was given
11946 us in the proffer of proof would change the attitude of the Supreme Court within the scope of those matters upon which it had specifically passed.

Now, that was the summary judgment. I am sorry not to be able to understand, but are you seeking to reopen that case?

Mr. KNUFF: No, your Honor. We are seeking to have this court comply with what we conceive to be the mandate of the Supreme Court. The Supreme Court did not make any findings of fact. The Supreme Court sent this case back

to this court to make findings of fact, and here is what the Supreme Court said about that,—

Judge GARRETT: Then, I guess we had better change our view, I mean, I had better change my view and let the findings of fact be made.

Judge STEPHENS evidently must have been right, if that is the interpretation, it was sent back here to this court to make findings of fact. Then, it was evidently necessary to have evidence to make findings of fact.

Mr. KNUFF: May I continue?

Judge JACKSON: Suppose you put forth your contentions and then we will have Mr. Connelly or whoever will speak on behalf of the defendants, put forth their contentions.

Mr. KNUFF: May I continue with what the Supreme Court said in connection with sending the matter back?

On page 399 of the Supreme Court opinion, this appears at page 21 of the government memorandum, this is 11947 what the Supreme Court said:

“The trial court made many other findings to which the Government objected—”

Chief Judge STEPHENS: Is this on the slip sheet?

Mr. CONNELLY: Thirty-three.

Chief Judge STEPHENS: Thirty-three?

Mr. KNUFF: I will start over again:

“The trial court made many other findings to which the government objected and yet to determine here whether each is erroneous is unnecessary. Perhaps looked at in isolation some of the government's charges are not proved with the fullness that would justify our reversal of the findings of the District Court on the point. It may be in the light of this opinion the District Court will conclude that many such findings are no longer significant in reaching its decision.”

Now, note:

“As to others a different result will be required. Enough has been said as to the findings and the evidence, we think, to enable the District Court to pass upon the facts that may come before it on further proceedings in accord with our present ruling.”

Now, since the Supreme Court has indicated that his court is to pass upon the facts in further proceedings, and a motion for summary judgment is a further proceeding, I do not know of any way that this court 11948 can comply with that mandate other than by making findings of fact.

Chief Judge STEPHENS: I thought, Mr. Knuff, the further proceedings which were contemplated by the Supreme Court, was an opportunity to the defendant to put in proof. In that portion of the opinion from which you read earlier this morning, the Supreme Court said:

"The General Electric case affords no cloak for the course of conduct revealed in the voluminous record in this case. That case gives no support for a patentee acting in concert with all members of an industry to issue substantially identical licenses, *etcetera*."

And then, it repeats:

"In the absence of specific abuses in this case which fall within the traditional prohibitions of the Sherman Act, it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert in restraining commerce in an entire industry under patent licenses, in order to organize the industry and stabilize prices."

I thought when the Supreme Court held that a *prima facie* case of action in concert to restrain commerce in an entire industry under patent licenses, in order to organize the industry and stabilize prices had been made, it meant only to reverse our conclusions that it had not been made and that in sending the case back to us for further proceedings, it meant to give the defendants an opportunity for a day in court to try and convince the court that they had not acted in concert, and had not executed the licenses other than to organize the industry and stabilize prices.

It seems to me that it really is very difficult to reach the conclusion that the Supreme Court has ordered us to make findings of fact without any further evidence in this case. Surely the due process clause gives the defendant the right to try and meet the Government's *prima facie* case, does it not?

Mr. KNUFF: That's right, and they had a day in court. They made their proffer as to what they intended to prove, and this court said, at least a majority said, that if everything was testified to which the defendants specify in their proffer, that that would not bring about any difference in the Supreme Court's opinion. They have had their day in court. They have made their proffer. This court has passed upon it. This court said that the proffer does not present any issue.

Judge GARRETT: Quite so. That expression was limited, though, to the proffer of proof that came within what we

conceived to be the findings of the Supreme Court of the United States; and, the findings with regard to the other matters, we regarded, Judge Jackson and myself at least did, and I don't think there was any great disagreement between Judge Stephens and I, we understand each others' opinions very well—there was no disagreement about that, but here, you are coming here and asking us to make findings of fact upon which the Supreme Court never passed. You are asking us to construe what the General Electric case means.

Mr. KNUFF: No, your Honor.

Judge GARRETT: Well, I don't know whether you are or not, but that is the way it seems to me.

Mr. KNUFF: We are only asking this court—

Judge JACKSON: You are asking us to make findings of fact according to your interpretation of the Supreme Court decision, and the light of the subsequent proceedings that were had.

Mr. KNUFF: That is right.

Judge JACKSON: You are entitled to that thought, whether we agree with it or not.

Mr. KNUFF: That is a different question.

I will now come to the findings of fact which we ask this court to make.

The defendants have objected to each of the findings that we have submitted, except findings 8, 10, 18, 19, 35, 39, 46, and 51. I do not intend to answer each objection that these defendants have made. The objections take up fifty pages in their memorandum.

Instead, I am going to do what the defendants have done.

I am going to classify their objections, and I will answer and point out that the classifications do not raise any legal questions that have any merit to them. To this end, I will adopt the same classifications that they make on pages 9 to 11 of their objections.

The first classification is that the findings are not supported by evidence, that many of the findings are not ultimate findings.

The first objection, that the findings are not supported by the evidence, of course covers every phase of the case and I will pass that for the moment.

Their second, that many of the findings are not ultimate findings implies at least that it is the duty of this court to find only the ultimate facts.

Now, whatever the rule may be in other circuits as to the duty of the court to find ultimate facts or to find both evi-

dentiary facts and the ultimate facts, the rule in this circuit certainly is clear. The rule in this circuit is, as Judge Stephens pointed out in the Saginaw Broadcasting case, the rule in this circuit is that the court is required to find both evidentiary facts and the ultimate facts.

Their second classification of objections is that the findings are wholly outside of the court's determination of the issues decided on June 29th, 1918.

Now, I have discussed that and I am not going to go into it again.

11952 The third classification—

Chief Judge STEPHENS: You have confused me. By June 29th, you mean the date of our decision when we dismissed the government's complaint?

Mr. KNUFF: That is right.

Judge JACKSON: That is not 1918, 1948 you mean.

Mr. KNUFF: What?

Judge JACKSON: You said 1918.

Mr. KNUFF: I meant 1948. I am going back thirty years, and I certainly did not mean to go back that far.

11953 Judge JACKSON: All right.

Mr. KNUFF: The third classification that the defendants make to the proposed findings is that they are inconsistent with and different from the former findings made by this court. Of course that is true. The Supreme Court passed upon many of the findings, and the Supreme Court said that those findings were wrong.

Now, this court on June 8, 1948, entered an order vacating the previous order of dismissal, and, it is our position that with that order vacating the previous order of dismissal, this Court set aside the former findings and conclusions. The defendants also say, under this classification, that this court is not required to find the facts differently than it found before.

Well, our answer to that is that the Supreme Court said you were. The Supreme Court said:

"As to others, a different result will be required."

And, the Supreme Court then was talking about findings.

The fourth classification is, that since there are facts which are in dispute, it would be improper for this court to make any findings.

Well now, the use of their expression "facts which are in dispute" requires some examination to determine the sense in which they use that expression. It has never been our understanding that the basic facts in this case were in

dispute. What was in dispute in this case is the
 11954 inferences which were to be drawn from those basic facts, the basic facts themselves being admitted.

Now, this same understanding that the Government had is the identical understanding of the judges who heard this case.

In the opinion in this case, reported in 67 Fed. Sup., Judge Stephens said:

"The conflicting contentions of the parties on the issue of fact in the case are not as to what the evidence is, or as to what are the basic facts shown by evidence. The dispute is to the inferences to be drawn from the basic facts and therefore as to what the ultimate facts are."

Chief Judge STEPHENS: If I may, I find it necessary to defend my own opinion, Mr. Knuff, although the Supreme Court didn't leave much of it to defend.

I made that statement for this court in the opinion, in reference only to the evidence that we had then heard, not with respect to evidence which might be introduced by the defendant.

Mr. KNUFF: That is right, that is right.

Since it is evident that the defendants are using facts in dispute as the equivalent of inferences in dispute, the answer to their contention should be fairly obvious. The correct rule is that where inferences alone are in dispute, the facts not being controverted, it is for the court to draw the inferences.

11955 Their fourth classification, rather, their fifth classification is that many of the findings are based on declarations and hence cannot be used as a basis for making findings. Well, the answer to that is that the Supreme Court said that the declarations are binding upon the others. That Court said that at page 388 of their opinion:

"We are unable to accept, however, the ruling of the court that the declarations of each defendant were admissible only against the defendant making the declaration. A consideration of that point really involves the heart of the case, since the treatment of the declarations may vitally affect its outcome. Some may have doubts as to whether the agreements and bulletins alone are sufficient to establish conspiracy; but the admissions of the separate declarations against all, greatly strengthens the Government's position. We think that industry-wise license agreements entered into, with

knowledge on the part of the licensor and licensee, of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins, were sufficient to establish the *prima facie* case of conspiracy. Each licensee, as is shown by the uncontradicted references, through their meetings and discussions that were preliminary to the execution of the licenses, could not have failed to be aware of the intention of United States Gypsum and the other
 11956 licensees to make arrangement for licenses industry-wide.

"The license agreements themselves, on their face, show this purpose. The licensor was to fix the minimum prices binding, both on itself and its licensees. The royalty was to be measured by a percentage of the value of all the gypsum products, patented or unpatented. The license could not be transferred without the licensor's consent, and the licensee opened its books of account to the licensor. The licensee was protected against competition with more favorable licenses and there was a cancelation clause for failure to live up to the agreement.

"Furthermore, the bulletins gave directions to the industry as to its prices and methods of operation in unmistakable terms. The District Court did not accept the foregoing facts as definite evidence of a conspiracy. To us, these facts are proof of a conspiracy. Certainly they are overwhelming evidence of a plan of the licensor and licensees to fix prices and regulate operations in the gypsum board industry."

Now, as I said previously, since there has not been introduced any other testimony in this case other than what was before the Supreme Court, the *prima facie* nature of the declarations now becomes conclusive in character and these are binding upon the defendants and the court can make findings based upon them.

. . .

12069 In the District Court of the United States
For the District of Columbia
Holding a Three Judge Court
Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; HENRY J. HARTLEY, FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS

Court Room,
U. S. Court of Customs and Patent Appeals,
Washington, D. C.,

Tuesday, June 14, 1949

Oral argument upon the proposed findings of fact, conclusions of law, and decree, in the above-entitled case was resumed at 10:00 a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

* * *

12070

PROCEEDINGS

Chief Judge STEPHENS: Proceed.

Argument on behalf of defendants United States Gypsum Company, SEWELL L. AVERY AND OLIVER M. KNODE—resumed.

By Mr. CONNELLY:

* * *

12090 Judge JACKSON: You have not submitted a form of that license, have you?

Mr. CONNELLY: I was coming to that here. On the theory that it would be an imposition upon this court and also lead to lengthy and unnecessary proceedings to be coming back to this court at various times in the future to determine whether provisions of license agreements were proper, reasonable, and the like, we have prepared forms

of license agreement, which we conceive to be unobjectionable in any respect, eliminating any provision of the prior license agreements that has been attacked, price-fixing provisions, and others. I will hand this up to the court.

Chief Judge STEPHENS: Have you handed one to Mr. Knuff?

Mr. CONNELLY: Yes.

Judge JACKSON: Do you desire, Mr. Knuff, to furnish a copy of license agreement of the type that you provide for in your compulsory licenses?

Mr. KNUFF: If the court wants us to, we will.

Judge JACKSON: I was just wondering. If you care to, you may.

Mr. KNUFF: I did not hear you, your Honor.

Judge JACKSON: I say if you care to, you may.

Mr. KNUFF: May I consider it without giving an 12091 answer right now?

Judge JACKSON: Oh, certainly.

Chief Judge STEPHENS: It would be a very great convenience to my colleagues, I should think, if the Government did furnish it. Otherwise, my two colleagues have to sit down and draw a license agreement if they should conclude that the suggested plan for a license agreement, if they should conclude that the form of suggested license agreement which you have in mind in your proposed decree, Mr. Knuff and Mr. Steffen, is enforceable; but, having no form in hand evidencing it, they will have to draw it themselves and then that will require more proceedings.

Mr. KNUFF: I would not think they would have to draw it, your Honor. They could do as I suggest in the decree.

Chief Judge STEPHENS: Well, they would in effect have to, Mr. Knuff, because if they simply put those terms in the decree and then the parties draw a license agreement in respect to which they are in dispute with the Government as to whether it conforms to the decree, they will have to come back to the court again for a hearing on whether or not the license agreements under which you are operating are in conformity with the decree of the court.

I had supposed that both sides, after reading over these papers, I had supposed that both sides would present proposed forms of license agreements. However, you are not required to do so.

12205 *Closing Argument on Behalf of the Plaintiff*
By Mr. Knuff

Mr. KNUFF: May it please the court, I want to at this time take up and clarify a point which, if it was clear before, certainly has been muddled by what has been said yesterday and today and, secondly, I want to discuss some of the provisions of the decree which the Government feels are absolutely necessary to restore competition in this industry.

If I understand the defendants' initial argument in this case—and I think I do—their argument is one to narrow the scope of this case in three respects:

First, they want to narrow the scope of this case as decided by the Supreme Court;

Second, they seek to narrow the scope of this case as decided by this court on the motion for summary judgment; and, hence,

Three, they thereby hope to limit the findings and the decree.

Counsel for U. S. G. said yesterday that the whole case is predicated upon the proposition that the conspiracy may be shown by establishing that the defendants entered into a plurality of licenses. Therefore, he argued that only a conspiracy to restrain trade is involved, not one covering Section II, the monopoly charge.

Furthermore, so he would argue, only patented 12206 board, not gypsum products, is covered by the issue in this case. The issues in this case, if the court pleases, as presented throughout this trial, as presented on the motion for summary judgment—rather, motion to dismiss—as presented to the Supreme Court, and as presented on the motion for summary judgment, are defined by the pleadings and by the evidence. The issue that is before this court and which was before the Supreme Court is that any combination of erstwhile competitors to enter into common price-fixing license agreements is illegal under the Sherman Act.

The Supreme Court by its reversal of Finding 118 affirmed that proposition. The Supreme Court said that there was a plan to blanket the industry under price-fixing license agreements and stabilize prices.

Counsel for U. S. G. stated yesterday at Transcript 8084, and I quote:

“Secondly, the Supreme Court made certain statements as to the law applicable to the situation of a

plurality of license agreements with price-fixing provisions, which this court held to be applicable to the admitted, undisputed facts in this case; and, on the basis of that, made its decision granting the motion for summary judgment."

He then stated on the same page that the law applicable to the situation of a plurality of licenses was based upon the holdings of the Supreme Court as set forth at pages 389 and 393 of the Supreme Court's opinion.

12207 At Transcript 8085 there is a quotation from page 389 of the Supreme Court opinion, reading:

"We think that the industry-wide license agreements, entered into with knowledge on the part of licensor and licensees of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins, were sufficient to establish a *prima facie* case of conspiracy."

He also quoted from page 393 of the opinion—and that appears at Transcript 8086—

Chief Judge STEPHENS: What transcript are you referring to?

Mr. KNUFF: 8086 of the transcript.

Judge JACKSON: Yesterday's proceeding.

Mr. KNUFF: That is right, your Honor.

Chief Judge STEPHENS: My page is 7966 to 8128.

Mr. KNUFF: 8086 is correct in mine.

Chief Judge STEPHENS: I thought you said only 85.

Mr. KNUFF: 8086. If I said anything else, I misspoke myself.

Chief Judge STEPHENS: Proceed.

Mr. KNUFF: Quoting from the Supreme Court at 393:

"The license agreements and the bulletins establish the conspiracy of the licensor and each licensee to violate the Sherman Act."

Now, note the context in which those statements appear. Those statements appear under Point III of the Supreme Court's opinion. Point III of the Supreme Court's opinion does not propose to define the issue in this case.

Point III of the Supreme Court's opinion was discussing a preliminary question, and that question is: When is there a *prima facie* case showing an association of conspirators in a common plan or a common enterprise or having a common objective, so that the declarations and acts of each individual can be binding on the others?

The Supreme Court in that portion of its opinion was dealing with a preliminary question as to whether or not the declaration rule was to be applied. It did not purport to set the limits of its decision under that section.

The Supreme Court in order to determine whether or not the rule in *Hitchman Coal & Coke v. Mitchell* was to be applied, had to first determine whether we had shown an association of individuals with a common purpose to promote a common cause, legal or illegal, so that then the Supreme Court could read or not read the declarations as binding upon all.

I repeat the Supreme Court was not laying down the law of this case in Point III, and when they take those two passages, which they quoted yesterday, and say that that is the law of this case, that a plurality of licenses constitutes a conspiracy, they are taking that out of context. The context in which that was used was to determine whether or not we had made out a *prima facie* conspiracy, for the purpose of applying the declaration rule.

The Supreme Court there pointed out at page 389 that each licensee was aware of U. S. G.'s intention to make the licenses industry-wide, that the licenses provided for price control, that the licensee was protected against competition with more favorable licenses.

The Court then said at page 389:

"The District Court did not accept the foregoing facts as evidence of a conspiracy."

The Supreme Court did not say:

"The District Court did not accept these facts as evidence of the conspiracy."

The Court then said:

"These facts are proof of a conspiracy."

They said that in order to apply the declaration rule.

Chief Judge STEPHENS: Were they not talking about the conspiracy charge? The last sentence at the top of page 24 follows what you read, which again repeats the words "a conspiracy", and says:

"Certainly they are overwhelming evidence of a plan of the licensors and licensees to fix prices and regulate operations in the gypsum board industry."

Mr. KNUFF: No, your Honor, I do not think that the Supreme Court was talking about anything in this section other than the application of the declaration rule. It starts out on page 388:

12210 "The trial court ruled that on motion to dismiss pursuant to Rule 41 (b), the court should weigh

the evidence and grant the motion if the Government failed to establish its case by a preponderance of the evidence, and the court further ruled," and so forth. Then they say in the next paragraph:

"We are unable to accept, however, the ruling of the court that declarations of each defendant were admissible only against the defendant making the declaration."

And then they point out the reasons why they cannot accept it. Then on 393 they say:

"We think that all of the declarations and acts which we have set forth in this opinion are in aid of the ultimate conspiracy. We do not attempt to fix a date when the conspiracy was first formed. At least, the declarations which we have quoted were made with the purpose of advancing a plan which ultimately eventuated in the licenses of 1929."

They start off Point III talking about the declaration rule, they end Point III talking about the declaration rule.

But in Point IV of the Supreme Court's opinion the Supreme Court did proceed to consider the whole case and considered whether in the light of all of the evidence, including the declarations, we had shown that the defendants associated themselves in a plan to blanket the industry and stabilize prices.

After reviewing, beginning on page 393, mentioning Interstate Circuit, mentioning specifically Finding 118, then continuing over on page 395, the Court said:

"The Government relied very largely on documentary exhibits, and called as witnesses many of the authors of the documents. Both on direct and cross-examination counsel were permitted to phrase their questions in extremely leading form, so that the import of the witnesses' testimony was conflicting. On cross-examination most of the witnesses denied that they had acted in concert in securing patent licenses or that they had agreed to do the things which were in fact done. Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involved mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous."

Now, if Finding Number 118 is erroneous, the correct finding is that the defendants did associate themselves in a plan to blanket the industry under patent license agreements and stabilize prices.

It follows that the motion which we presented last June was based upon this broad proposition that the defendants, being erstwhile competitors, entered into common price-fixing license agreements for the purpose of organizing the industry and stabilizing prices.

The plurality of licenses was not the conspiracy. The license agreements were only evidence of the conspiracy. The conspiracy in this case was the plan to blanket the industry under patent licenses and stabilize prices. That conspiracy, that plan was set forth in paragraph 45 (a) to (e) of our complaint.

Paragraph 45 charged the defendants with fixing prices on board, standardizing product, eliminating jobbers, attempting to fix the resale prices of manufacturing distributors, and attempting to fix the prices on unpatented gypsum products.

That is the conspiracy, not the plurality of licenses. And it is important that the court understands this. The plurality of licenses is not the conspiracy in this case.

Now, the defendants have never met that. The conspiracy is, as I said, paragraph 45 (a) to (e) and the other paragraphs of the complaint which define it.

* * *

12215 Mr. KNUFF: Section III. The defendants say that Section III of the decree should not contain any provisions relating to monopoly. Their reasons are that the language, which I have pointed out on page 389 and 393, relating to this preliminary question, compels this result.

Well, of course, the answer to it is as I have indicated. The language at 389 and 393 was used for the purpose of determining a preliminary question. It did not purport to rule on the scope of this case. Therefore, there should be included in this section of the decree provisions relating to Section II of the Sherman Act. That is, the monopoly section. —

Now, in addition, a further answer can be made that the Supreme Court has specifically said, when they were passing on this case under Section IV, that the defendants have monopolized board. They said that, not under Section IV, they said it under Section V; and at page 490 here is what the Court said:

"Patents grant no privilege to their owners of organizing the use of those patents to monopolize an industry through price control, through royalties for the patents drawn from patent-free industry products and through regulation of distribution. Here patents have been put to such uses as to collide with the Sherman Act's protection of the public from evil consequences. The defendants did undertake to control prices and distribution in gypsum board. They did utilize an agency, Board Survey, Inc., to make this control effective. Such facts, together with the other indicia of intent to monopolize the gypsum board industry, hereinbefore detained as to the agreements, bulletins and declarations, convince us that the defendants violated the Sherman Act."

Now, our Section III, dealing with the monopoly charge, is in line with the language that the Supreme Court used. We say there:

"The said defendants * * * have monopolized, attempted to monopolize, combined and conspired to monopolize trade and commerce in gypsum board * * *"

That is what the Supreme Court said at page 400.

On June 29 of last year we argued this same proposition before this court, and I want to call the court's attention to page 38 of our brief on that argument.

Chief Judge STEPHENS: What date was that?

Mr. KNUFF: Page 38.

Chief Judge STEPHENS: What date?

Mr. KNUFF: June 29, 1948, your Honor, page 38, where we set out the cases and where also we set out in full just what the defendants have done.

Chief Judge STEPHENS: Just a minute. That is June 29?

Mr. KNUFF: Yes.

12217 Chief Judge STEPHENS: And the pages there run from 7800 to 7942.

Mr. KNUFF: If your Honor pleases, I am referring to our memorandum that we filed on that date, page 38.

Chief Judge STEPHENS: I thought you were talking about the argument.

Mr. KNUFF: I realized there was some slight confusion.

Now, the Supreme Court has said in the American Tobacco case that the material consideration in determining whether or not a monopoly exists is not that prices are raised or that competitors are excluded from the market,

but that power exists to raise prices and exclude competitors and that an intent to do so is present.

Now, look. These license agreements provided for price control. It is an admitted fact in this case that U. S. G. did fix the prices, not on fifty percent of the board, not on sixty percent of the board, but on one hundred percent of the board manufactured in the Eastern area.

So that the first portion of the American Tobacco decision we more than meet. It is not a question that prices have been raised, but that power exists. We not only show power, but we show the exercise of that power. Prices have been fixed. They were fixed in this industry from November, 1929, down to at least June or July 8, 1941.

The second phase of that test: Did they have 12218 power to exclude others from the industry? Of course they did. Under Article IX of the license agreements of November, 1929, before any manufacturer could sell board at any price to a manufacturing distributor, he had to have U. S. G.'s permission. It was not a question whether or not he was going to sell board at a discount that he had to have U. S. G.'s permission. Before he could sell board at any price, under Paragraph IX of that November, 1929, license agreement, he had to get U. S. G.'s consent.

They had power there to exclude. Did they use the power? Of course, they used the power.

They excluded from this industry all jobbers of board. Those jobbers of board have been excluded from this industry since August 8, 1930, down to the present time, and U. S. G. does not offer to prove differently in their proffer.

So that when you consider the test that we have to meet, as laid down in the American Tobacco case, we not only meet the test, we more than meet it. We show not only power, but we show the exercise of the power. I am not pressing at this time, although I am not waiving it, the exclusion of Cardiff Gypsum Company.

The defendants argue, with reference to this same Section III, that the decree should be limited to patented board. Well, there are some considerations that I think ought to be called to the court's attention in connection with that.

First, so limited, this puts the defendants in the 12219 position to argue that in 1954, when the patent license agreements expire, that then this section of the decree would have no application to what they are manufacturing; and

Second, whether or not the board that is manufactured is patented, is certainly a debatable question.

The relief, to be adequate, should cover every type of board.

12220 Justice Jackson in the International Salt case said:

"When the purpose to restrain trade appears from a clear violation of the law, it is not necessary that all the untraveled roads to that end be left open and only the worn ones be closed."

Now, has there been a clear violation of the law? I submit that these defendants have violated the Sherman Act in almost every conceivable way possible, and they have done it for more than twenty years.

When the purpose to restrain trade appears from a clear violation of the law, then putting the matter affirmatively, it is the duty of the court to block all roads. This decree should not be limited to patented board, it should comprise all types of board.

Judge JACKSON: Gypsum board.

Mr. KNUFF: Gypsum board, not patented board. I am passing by, I make no point as to whether or not the defendants manufactured patented board because I argued before that there was no evidence in this case showing any patented board had been made.

Now, third, there is nothing in the Supreme Court's opinion which would restrict this case to patented board. At pages 389 and 393, what the court there said again was in connection with the declaration rule; and in Point IV of the opinion the Supreme Court said that the evidence disclosed that the defendants did associate themselves in a plan to blanket the industry under licenses and sta-

12221 bilize prices. The court did not say that the evidence disclosed a plan to stabilize prices on patented board.

12229 Judge GARRETT: I really wondered why in that Line Material case—Justice Douglas, I believe it was Justice Douglas—went very frankly to the heart of the matter and said, "We ought to overrule that General Electric case."

12230 I could understand this better and could follow it with much more ease if the court had overruled it instead of trying to keep the Electric case as the law or a part of the law and at the same time nullify it if the decree that you are contending for be granted.

I hope you will understand my position about this matter. I want to follow the Supreme Court.

Mr. KNUFF: I know you do, your Honor.

Judge GARRETT: In every way that it should be followed. In fact, I must follow it. That is the law. That is the Supreme Court, that not only every citizen should follow, but, first of all, every court should follow. So I want to follow it; but I do not want to go beyond what it said in the decision affecting this case, unless there were proof here upon controverted questions concerning which you are insisting upon a decree.

Mr. KNUFF: Well, we take the position that there are no questions of fact in dispute in this case, that the matters that are in dispute in this case are inferences, the facts themselves being admitted.

These defendants do not take the position that Mr. Lenci's testimony is incorrect. They do not take the position that Mr. Blagden's testimony is incorrect, they do not take the position that Mr. Griswold's testimony is incorrect, they do not take the position that C. O. Brown's 12231 testimony is incorrect. They do not take the position that Mr. Frederick Tompkins' testimony is incorrect. In fact, they do not offer to disprove any of that. They do not agree with the inferences that we draw and, therefore, they say that since we draw different inferences, there are facts in dispute. I do not think that inferences in dispute is synonymous with facts in dispute.

Now, I want to call your Honors' attention to one thing that will take me about three minutes to do, maybe four, possibly five, and then I am going to sit down.

We contend that there must be findings made in this case, and the reason why findings must be made I have already discussed and I am not going to go into it again. But, in addition to what I have already said, I want to call your Honors' attention to certain salient facts in this case.

This court made findings before. It made findings on the basis, first, that the General Electric case sanctioned everything that the defendants did here; second, this court ruled that we had not made out a *prima facie* case of conspiracy and, therefore, the declarations were not binding upon all of the defendants; and, third, this court ruled that the evidence fails to disclose that the defendants associated themselves in a plan to blanket the industry and stabilize prices.

Now, each one of those facts, each one of those circumstances was reversed in the Supreme Court. The former findings were made on the basis of those three circum-

stances. The Supreme Court said that the General Electric case did not apply. The Supreme Court said that the declaration rule did apply and they were binding upon all the defendants. The Supreme Court said that there was a plan.

Now, obviously, since this court's prior findings were made on the basis of those three circumstances, which I have mentioned; and since the Supreme Court has said that they were wrong, certainly, I think that in the light of what the Supreme Court said—in fact, as I interpret it, in the directive of what the Supreme Court said, this court is required to change its findings and make findings in accordance with the fact that the General Electric case does not apply; make findings in accordance with the proposition that the declarations are binding, and make findings in accordance with the principle that there was a plan to blanket the industry under patent license agreements and stabilize prices.

I think that is all I have to say. Thank you.

Chief Judge STEPHENS: You leave me, Mr. Knuff, entirely mystified as to what the position of the Government really is in this case. I thought when you made a motion for summary judgment and asked the court to make it on the basis of the rule which provided that there shall be a summary judgment if there is no genuine issue of material fact.

Mr. KNUFF: That is right.

Chief Judge STEPHENS: And that being conceded 12233 in the case, that patent licenses with price fixing provisions were executed on an industry-wide basis and that the parties adhered to them, that under the decision of the Supreme Court warranted summary judgment.

That was the theory on which my colleagues announced, as I understood them, that summary judgment would be entered. But you now tell, as I understand your argument during the last half hour, that the Supreme Court did not decide in Topic III of its decision that plurality of licenses with price fixing provisions was illegal, except for the preliminary purpose of determining whether or not there was a conspiracy sufficient to allow the court to rely on those declarations.

If you take the position that the Supreme Court has not decided that a plurality of licenses with price fixing provisions, industry-wide, and adhered to, which is undisputed in the case, is illegal and ask for the summary judgment to

be entered on some other theory, it must be on the theory that the Supreme Court has decided the whole case on the facts although the defendants have never been heard.

Now, the defendants deny, as I pointed out in the opinion of this court, after admitting the undisputed facts about the execution of the license agreements and the terms thereof and the price fixing provisions and the adherence thereto, the defendants deny that they have violated Sections I,

12234 II, and III, of the Sherman Act, or any of such sections, by being parties to contracts in restraint of trade and commerce, or by combining and conspiring to restrain trade and commerce, or by attempting to monopolize and monopolizing trade and commerce in gypsum board, plaster, and miscellaneous gypsum products, or in any manner charged in the complaint, or at all. They deny the allegations of paragraph 46 of the complaint to the effect that the license agreements were entered into by concerted action to give color of legality to the combination and that they were not *bona fide* license agreements, reasonably designed to give to U. S. G. the pecuniary reward for valid patent monopolies; they assert that on the contrary the license agreements were *bona fide* in both law and fact and were reasonably designed to secure to U. S. G. the pecuniary reward to which it was entitled for its valid patent monopolies.

The defendants have never had a hearing on those allegations in their answer. And if you are asking this court, the majority of the court, to enter a summary judgment, not upon the theory that the Supreme Court has held that the plurality of licenses with price fixing provisions industry-wide and adhered to is illegal, but upon the theory that it decided the whole case, then it seems to me you are either saying the Supreme Court has decided the case while there were issues of fact and it decided it in a manner which would deny the defendants the right to be heard, or else you are asking this court to do that. In which event, for the first time, I think, any one has asked the court
12235 to decide a case in denial of due process of law, because certainly the defendants are entitled to a hearing on the controverted issues in this case.

Mr. KNUFF: May I speak on that?

Chief Judge STEPHENS: Yes, sir.

Mr. KNUFF: The defendants have had their day in court. The defendants filed their proffer of proof. This court held that under the proffer of proof, even if everything that they testified to were true, it would not bring about any change.

Chief Judge STEPHENS: Mr. Knuff, I can save time, I think, although I want to hear you clear through, if I say I think the answer to that is that the reason my colleagues granted the motion for summary judgment was because they thought the Supreme Court had decided that a plurality of patent licenses with price fixing provisions, adhered to throughout the industry, had been held illegal by the Supreme Court and, therefore, these other issues were immaterial; but you say now that is not the decision of the Supreme Court.

Mr. KNUFF: No, your Honor, I did not say that.

Judge JACKSON: I did not understand you to say that, did you?

Mr. KNUFF: No, I do not say that, your Honor. I say that the Supreme Court said that, but the Supreme Court said something else. When the Supreme Court said that a plurality of licenses in this case showed a conspiracy, I pointed out that they were using that expression in connection with the declaration rule.

The Supreme Court did say that a plurality of licenses, on page 400, was wrong:

"The General Electric case affords no cloak for the course of conduct revealed in the voluminous record in this case. That case gives no support for a patentee, acting in concert with all members of an industry,"—under which patent licenses are entered into by the terms of which the industry is completely regimented.

The Supreme Court decided that a plurality of patent licenses was bad, but they decided something more than that. They did not decide just that. Do I make myself clear?

Chief Judge STEPHENS: I am sorry. Perhaps I am obtuse, Mr. Knuff, but I thought during the first fifteen or twenty minutes of your argument this afternoon you spent most earnestly asserting that Article III of the Supreme Court's opinion was only a tentative decision for the purpose of determining whether or not there had been action in concert, whether legal or illegal, to use your phrase, and that the Supreme Court had not decided that a plurality of licenses with price fixing provisions, industry-wide, and adhered to was illegal. I am sorry if I misunderstood you.

12237 Judge JACKSON: I thought you said that a mere plurality of licenses was not *per se* or of itself illegal, but I did not understand you to say that licenses with price-fixing provisions that are adhered to and covering

the whole industry does not show a violation of the Sherman Act.

Mr. KNUFF: I think that—

Judge JACKSON: Did you?

Mr. KNUFF: I think plurality of licenses with price-fixing is illegal. I think that.

Judge JACKSON: Sure, if it covers the whole industry.

Mr. KNUFF: I think that, yes, indeed, and I think the Supreme Court said that.

Chief Judge STEPHENS: Well, with great respect to my colleagues and to all counsel, it seems to me, having heard argument for two days here now, that we are right back where we were on the motion for summary judgment. It seems to me what the Government is really asking this court to do, what my colleagues will be doing if they enter this summary judgment on the Government's theory, is to deny the defendants a right to be heard on the controverted issues in this case under the pleadings, and I think no summary judgment is justified under those circumstances, and I respectfully and earnestly protest against it.

Judge GARRETT: In view of that, I would like to say that

I shall not agree to a decree with respect to the summary judgment which goes beyond those specific findings of fact that the Supreme Court made and which have been pointed out here again and again.

If a decree is demanded with respect to facts not proven, certainly, I will not agree to it.

Judge JACKSON: But at the same time any decree that is issued should be sufficiently strong to restrain the defendants, any and all of them, from doing the things that the Supreme Court has held to be a violation of the Anti-Trust Act.

Chief Judge STEPHENS: My colleagues think that the statement which I made yesterday, that we hoped to reach a decision on the terms of this decree by the first of the coming month was over-optimistic. In view of the complexity of the argument and the many suggestions made by the defendants and the Government, both my colleagues feel and ask me to announce that they probably will not be able to reach a decision on the decree until the summer is closed.

. . .

12242

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,
(SEAL)

*To the Honorable the Judges of the District Court of the
United States for the District of Columbia,*

Greeting:

WHEREAS, lately in the District Court of the United States for the District of Columbia, before you, or some of you in a cause between The United States of America, Plaintiff, and United States Gypsum Company, *et al.*, Defendants, Civil Action No. 8017, wherein the final decree of the said District Court, entered in said cause on the 5th day of August, A. D. 1946, is in the following words, viz:

"This cause having come on for trial, and the plaintiff having completed its presentation of evidence, and the Court having made and filed its Findings of Fact and Conclusions of Law,

It is hereby adjudged and decreed that the complaint as amended herein be, and the same hereby is, dismissed on the merits.

HAROLD M. STEPHENS.

FINIS J. GARRETT.

JOSEPH R. JACKSON."

12243 as by the inspection of the transcript of the record of the said District Court, which was brought into the SUPREME COURT OF THE UNITED STATES by virtue of an appeal, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

12244 AND WHEREAS, in the present term of October, in the year of our Lord one thousand nine hundred and forty-seven, the said cause came on to be heard before the said SUPREME COURT, on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court, in this cause be, and the same is hereby, reversed.

AND IT IS FURTHER ORDERED that this cause be, and the same is hereby, remanded to the said District Court for further proceedings in conformity with the opinion of this Court.

March 8, 1948.

12245 You, therefore are hereby commanded that such further proceedings be had in said cause, in con-

formity with the opinion and decree of this Court, as accordingly to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS, the Honorable Fred M. Vinson, Chief Justice of the United States, the ninth day of April, in the year of our Lord one thousand nine hundred and forty-eight.

CHARLES EDWARD CROPSEY

File No.

SUPREME COURT OF THE UNITED STATES

No. 13—, October Term, 1947

THE UNITED STATES OF AMERICA

vs.

UNITED STATES GYPSUM COMPANY, *et al.*

MANDATE

U. S. GOVERNMENT PRINTING OFFICE 426362

FILED

Apr. 10 1948

HARRY M. HULL, Clerk

12246 In the District Court of the United States
For the District of Columbia

(File Endorsement Omitted)

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY, *et al.*, DEFENDANTS

Order on Mandate—Filed June 8, 1948

United States of America having appealed to the Supreme Court of the United States from the judgment entered in this cause on the fifth day of August, 1946, and the said court having issued its mandate dated the ninth day of April, 1948, wherein it was ordered, adjudged and decreed that said judgment be reversed and the cause remanded to the District Court for further proceedings in conformity with the opinion of the Supreme Court of the United States;

Now upon the mandate of the Supreme Court of the United States, dated the ninth day of April, 1948,

IT IS ORDERED, ADJUDGED AND DECREED that the judgment of this court entered the fifth day of August, 1946, be and the same is hereby vacated and set aside; and that the cause

be restored to the docket for further proceedings in accordance with such mandate.

Dated June 8, 1948.

HAROLD M. STEPHENS
FINIS J. GARRETT
JOSEPH R. JACKSON

A true copy

Test:

HARRY M. HULL, *Clerk*

By H. N. GRAVES

Deputy Clerk

(SEAL)

12247 In the District Court of the United States
For the District of Columbia

(Title Omitted)

(File Endorsement Omitted)

Plaintiff's Motion for Summary Judgment—
Filed June 15, 1948

1. Plaintiff, by its attorneys named below, upon the pleadings and all the proceedings heretofore had herein, including but not limited to all exhibits and testimony of witnesses, the admissions of counsel for the defendants, hereby respectfully move this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in its favor; or, in the alternative,

2. If summary judgment is not rendered in plaintiff's favor upon the whole case or for all the relief asked and further trial is necessary that the Court, at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the actions as are just.

Dated June 15, 1948

ROScoe T. STEFFEN

Roscoe T. Steffen

EDWARD KNUFF

Edward Knuff

*Special Assistants to the
Attorney General.
Attorneys for Plaintiff*

12248 In the District Court of the United States
For the District of Columbia

(Title Omitted)

(File Endorsement Omitted)

Defendants' Offer of Proof—Filed June 15, 1948

Pursuant to the Court's request of June 8, 1948, the defendants offer to prove the following facts by witnesses to be sworn and documents to be produced upon the resumption of the trial herein:

1. There was no agreement or understanding between the United States Gypsum Company (USG), patentee, and the other defendants or any of them that they would associate themselves in a plan to blanket the industry under patent licenses and stabilize prices or issue or cause to be issued substantially identical licenses to all of the defendants or any number of them.

2. There was no agreement or understanding between USG, patentee, and the other defendants or any of them, that there would be industry-wide licensing or that the licensor, under patent license agreements, would organize the industry and stabilize prices of patented gypsum board or any other product.

12249 3. In offering and issuing licenses to the other defendants the licensor acted independently and not by virtue of any agreement or understanding with the other defendants or any of them that prices would be fixed or stabilized throughout the industry, or that the industry would be regulated or regimented.

4. At all times the licensor was willing to license any one manufacturer without regard to whether or not a license was taken by any other manufacturer or manufacturers.

5. At all times from 1912 to date the sole interest of the licensor in enforcing its patent rights by litigation, in the settlement of its patent litigation, in the offering and issuance of its patent license agreements and in the enforcement thereof, was to secure to itself the full benefits of its patents and not to enter into a plan or scheme to stabilize the gypsum industry. The companies which became licensees did so because they desired to settle or avoid litigation and to obtain the right to use USG's patents, considering it a business necessity to be able to do so.

6. Beginning prior to 1912 and continuing thereafter USG developed by its own research the new closed-edge

gypsum board and the processes for the manufacture of the same, and obtained, on August 6, 1912, Utzman Patent No. 1,034,746 covering said improved closed-edge board and subsequently other patents covering said improved board and processes for making the same, including Utzman Patent No. 1,330,413 covering a complete machine and apparatus for making said patented board, which was issued on February 10, 1920. All of these inventions were made by employees of USG in the performance by them of research work for which they were employed, and 12250 the applications for and letters patent for such inventions were duly assigned to USG as its own property.

7. A description of the methods of manufacture of gypsum board before and after the Utzman inventions, together with the costs of production and market conditions resulting in the demand of the trade for the improved closed-edge board to the exclusion of the open-edge board will be shown.

8. During the period from the commencement of the production of gypsum board under the Utzman patents until the granting of the licenses thereunder and continuing thereafter until the commencement of this suit, open-edge board was unable to compete with the patented closed-edge board. The acceptance by the trade of the closed-edge patented board and the demand for it in the building industry supplanted the use and sale of the open-edge board.

9. The claims of said patents were infringed by the Bestwall Manufacturing Company (Bestwall), the American Gypsum Company (American), the Universal Gypsum and Lime Company (Universal), the National Gypsum Company (National), and the Niagara Gypsum Company (Niagara), all manufacturers of gypsum board in the Eastern area of the United States and by other manufacturers of gypsum board in such area, which infringements were compelled by the superior quality of the patented board and the demands of the trade therefor. The extent of such infringement and the cost to patentee in protecting the claims of its said patents and its damages suffered by reason of such infringement will also be shown.

10. USG, between 1917 and 1928, instituted suits for infringement against Bestwall, Beaver Products Company, Inc. (Beaver), American, Universal and National. 12251 In 1921 the United States Circuit Court of Appeals for the Seventh Circuit, in a suit against Bestwall

held the patents of USG valid and infringed. Beaver, in the course of such litigation, had acquired Bestwall, and USG, by supplemental bill filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, sued both of these companies for infringement, in which suit a final judgment was entered in 1925 finding that said patents were infringed and enjoining and restraining the defendants from further infringement and directing an accounting for damages against the defendants.

11. USG, in addition to commencing such infringement suits, notified Niagara and other infringers of said patents that unless they ceased infringement, suit would be commenced against them for damages and for appropriate relief to prevent future infringement. In 1927 it also notified the Texas Cement Plaster Company (Texas), which had equipped its plant to make a closed-edge board, of USG's patent rights and that suit for infringement would be commenced if it produced a closed-edge board in its newly equipped plant. In the same year it notified the Atlantic Gypsum Products Company (Atlantic), which was about to equip its new plant to manufacture gypsum board, of USG's patent rights on closed-edge board and the processes for making the same.

12. Prior to the last mentioned judgment for infringement Beaver, by its president, A. S. Blagden, entered into negotiations for settlement of said infringement suits with S. L. Avery, president of USG, which negotiations continued until a final settlement was reached on July 29, 1926. At a meeting in December, 1925 Mr. Avery specified as his terms of settlement the payment of damages 12252 for Beaver's infringement, acknowledgment of the validity of USG's patents, payment of royalties, and the right in USG to fix the prices of patented board to be made and sold by Beaver. Settlement was made between the two companies on July 29, 1926, under the terms of which Beaver paid USG the sum of \$250,000 cash damages and further agreed to pay to it in settlement of said claim and for the privilege of using said patents and making and selling patented board thereunder an amount equivalent to 5% of its selling price of all board sold by it until August 6, 1929, the date of the expiration of said Utzman patent No. 1,034,746, and thereafter an amount equivalent to 11½% of its selling price of all board sold by it from August 6, 1929, until February 10, 1937, the date of the expiration of said patent No. 1,330,413. As a part of the

settlement USG, as licensor, and Beaver, as licensee, entered into the license agreement of July 29, 1926 (Gov. Ex. No. 1). The terms fixed by USG as a basis for the settlement and the license agreement with Beaver were the same terms demanded of each subsequent licensee of USG. USG did not deviate from those terms in any of its license agreements.

13. The license so granted to Beaver was separately and independently negotiated and entered into between USG, as licensor, and Beaver, as licensee, and there were no agreements or understandings to issue substantially identical licenses to any other member or members of the industry or that other members of the industry would take similar licenses under said patents.

14. The memorandum of December 12, 1925, sent by Mr. Blagden, president of Beaver, to Mr. Avery, president of USG, was not accepted or approved by Mr. Avery and was never at any time discussed by him with 12253 Blagden or anyone else, nor was the same referred to by either Avery or Blagden during or after their negotiations. Mr. Avery never entered into any agreement or understanding with Mr. Blagden with respect to anything contained in such memorandum and particularly never agreed with him or anyone else that Beaver or Blagden would agree to use or use its or his best efforts to induce other members of the industry to accept similar licenses from USG, nor did he authorize it or him to do so.

15. Blagden or Beaver was not at any time authorized to represent USG or Avery in negotiations with other manufacturers of gypsum board. Any efforts which Blagden may have made to induce such other manufacturers to become licensees of USG were independent efforts of Blagden and were made without any authorization from USG or Avery, and were not the result of any agreement or understanding among the defendants or any of them.

16. Blagden's letter to Avery of October 1, 1926 (Gov. Ex. No. 189, R. 5349), in which he referred to the "entente cordial" between their two companies and stated that "if we play the game right it should bring about big things" were merely an expression of Blagden's opinion that it would be advantageous for USG and Beaver to live up to the terms of their license agreement, and was not understood by Avery or by Blagden as referring to any agreement or understanding among the defendants or any of them to fix prices or stabilize the gypsum industry.

17. Frank J. Griswold, general manager of American, was not at any time authorized to represent USG or Avery in negotiations with other manufacturers of gypsum board.

While USG's infringement suits were pending 12254 against American (September, 1925—November, 1929), Griswold's correspondence and conferences with representatives of various unlicensed manufacturers of gypsum board with respect to the possible acceptance by those manufacturers of licenses from USG did not receive any authorization from USG or Avery and did not result from any agreement or understanding among the defendants or any of them. Such correspondence and conferences were independently undertaken and conducted by Griswold in an attempt to obtain concessions and more favorable terms than those accorded by USG to other licensees if and when American should be able to settle its pending litigation and enter into a license agreement with USG, or were prompted by Griswold's activities in a proposed merger of certain companies in which proposed merger neither USG nor Avery was interested.

18. Eugene Holland, who became president of Universal in 1928, was not at any time authorized to represent USG or Avery in negotiations with other manufacturers of gypsum board. Any efforts which Holland may have made to induce such other manufacturers to become licensees of USG were independent efforts of Holland, and were made without any authorization from USG or Avery, and were not the result of any agreement or understanding among the defendants or any of them.

19. In September 1926 Universal on its own initiative, and without the intervention of any other party entered into negotiations with USG to settle the claim which the latter had against the former for infringement of the Utzman patents. In these negotiations Mr. Avery, on behalf of USG, insisted upon the same terms of settlement which he had specified in the negotiations with Beaver. 12255 On September 17, 1926, after protracted negotiations, an agreement was reached by the parties under the terms of which Universal agreed to pay to USG in settlement of said claim the sum of \$35,000 and 5% of licensee's selling price of all gypsum board manufactured and sold by it until August 6, 1929, and 1½% of such selling price from August 6, 1929, to February 10, 1937. On the same date a license agreement was entered into between the parties (Gov. Ex. No. 2).

20. This license was separately and independently negotiated and entered into between USG, as licensor, and Uni-

versal, as licensee, and there were no agreements or understandings of any kind to issue substantially identical licenses to any other member or members of the industry or that any other member of the industry would take a similar license under said patents. The negotiations were conducted solely between the parties to the license and involved no one else. Neither Blagden nor Griswold nor any other person or company except the parties to said license had anything to do with the negotiations for or the execution of the same.

21. In the spring of 1927 Atlantic, through its then president, applied to USG for a license under said patents in connection with a new plaster mill and board plant which the former was installing at Portsmouth, New Hampshire. Negotiations between the two companies resulted in the execution on March 5, 1927, of a license agreement similar in terms to that of Beaver, except that there were no provisions for settlement of any claim for damages as Atlantic was not an infringer of said patents.

22. Texas, having equipped its plant to make a closed-edge board, applied for and received a license from USG under said patents similar in terms to that of Atlantic. This license was executed on April 18, 1927.

23. The licenses so granted to Atlantic and Texas were each separately and independently negotiated and entered into between USG, as licensor, and Atlantic and Texas, respectively, as licensees, and there were no agreements or understandings of any kind to issue substantially identical licenses to any other member or members of the industry or that any other member of the industry would take a similar license under said patents. The negotiations were conducted solely between the parties to each license and involved no one else.

24. In January 1928 Certain-feed Products Corporation (Certain-feed), then making an open-edge board, had agreed to purchase the assets of Beaver, the consideration for which purchase was to be paid to the stockholders of Beaver, but under which arrangement Certain-feed had refused to assume the license agreement of Beaver with USG. USG thereupon brought an action in equity in the United States District Court for the Northern District of Illinois, Eastern Division to protect its claim of over one million dollars for prior infringement of its Utzman patents by Beaver. In order to prevent the entry of an order restraining the transfer of the proceeds of the sale to the stockholders of Beaver, Certain-feed was required to post a bond

in the sum of one million dollars. Negotiations for settlement of this litigation by means of a license to Certain-teed under the Utzman patents continued intermittently from the time the bond was posted on March 28, 1929, until a settlement was finally arrived at in May 1929, which negotiations were carried on strictly between the parties involved.

25. With the pending litigation both for infringement of USG's patents against other members of the industry and the suit to enjoin and the attendant bad feeling resulting therefrom, a price war broke out in the industry during which gypsum plaster products were selling below the cost of most of the companies manufacturing and selling such products.

26. By January 1929 American, National, Ebsary Gypsum Company (Ebsary) and Niagara had each inquired of USG for the terms upon which Mr. Avery would grant a license and for license agreements containing terms acceptable to USG. USG submitted to each of them forms of license agreements containing the terms originally specified by Mr. Avery as his terms of settlement. All of these companies except Ebsary were at the time infringing the Utzman patents. These inquiries were made to USG independently of one another.

27. On May 16, 1929, National, having obtained from USG a form of license agreement satisfactory to USG, executed the same and mailed it to USG. This agreement (Gov. Ex. No. 3) was substantially the same as the licenses granted to other licensees except for the amount of damages for infringement, which was different in each case. In this connection National agreed to pay to USG in settlement of the latter's claim for damages an amount equal to 5% of the selling prices of licensee of all gypsum board, whether patented or unpatented, manufactured and sold by licensee until August 6, 1929, and thereafter 1½% of such selling price until February 10, 1937, and in addition thereto an amount equal to 3½% of such selling price from August 6, 1929, until said 3½% aggregated the sum of approximately \$180,000.

28. Three unlicensed manufacturers, Certain-teed, Ebsary and Niagara were present at the meeting of certain licensed and unlicensed manufacturers in Chicago on May 21, 1929, and after protracted negotiations, took licenses under said patents from USG. During the period of this meeting separate negotiations independent of one another were had with each of these com-

panies, resulting in the Certain-teed case in a complete settlement of the litigation then pending, its assumption of Beaver's obligations with respect to past infringement, and the taking of a license (Gov. Ex. No. 4). In the case of Ebsary the matter was discussed with the company and its counsel, as a result of which Ebsary agreed to take and did take a similar license (Gov. Ex. No. 5) except there was no claim for damages to be settled. Mr. Rebb of Niagara, in separate negotiations, settled USG's claim for infringement by agreeing to pay to USG an amount equal to 5% of the selling price of licenses of all gypsum board, whether patented or unpatented, manufactured and sold by licensee until August 6, 1929, and thereafter $11\frac{1}{2}\%$ of such selling price until February 19, 1937, and in addition thereto an amount equal to $31\frac{1}{2}\%$ of such selling price from August 6, 1929, until said $31\frac{1}{2}\%$ shall aggregate the sum of \$27,650.85. Niagara was granted a license under said patents, similar to the other licenses except for the amount of the claim for damages.

29. The licenses so granted to National, Certain-teed, Ebsary and Niagara were separately and independently negotiated and entered into between USG, as licensor, and National, Certain-teed, Ebsary and Niagara, respectively, as licensees. There was no agreement or understanding with USG to issue substantially identical licenses to National, Certain-teed, Ebsary and Niagara upon the condition that they or any two or more of them would take such licenses or that other members of the industry would take similar licenses under said patents, each of them being free throughout the entire negotiations for said licenses to take or not to take a license according to its own individual determination.

30. It was not the fact that Mr. Avery or USG were not interested in negotiating settlement with others in the industry or granting such other licenses unless all board manufacturers or any one or more of them was included. Neither Mr. Avery nor any one on behalf of USG at any time stated or made it clear to anyone that, if price-fixing could not be worked out or continued under the Utzman patent, there were other patents available for the purpose, nor was there any agreement or understanding at any time among the defendants or any of them to the effect that the expiration of the Utzman patent was not a practical reason for continuing the conflict in the industry.

31. On May 23, 1929, USG disclosed to its licensees the existence of the new bubble invention, which was a method

of making a lighter and cheaper gypsum board by introducing soap foam in place of sawdust, for which an application for letters patent had been filed. Sawdust was not only scarce and expensive but its use resulted in a heavy board costly to dry, ship and install. USG offered a license under the new bubble invention to any of its licensees who might be interested in taking it.

32. During the negotiations for the bubble license in the summer of 1929, Holland, president of Universal, charged USG with infringement of Universal's starch patents.

33. Universal's starch patents (the Haggerty and Hite patents) covered, respectively, gypsum board employing starch or a cooked carbohydrate in the core of the 12260 board to insure a good bond between the core and the paper covering sheets (thus solving the "peeler" trouble in the gypsum board industry and making possible high speed production), and a heat insulating material and method of making the same. It was impossible to make a satisfactory gypsum board without using starch and the starch patents.

34. Upon investigation, Avery found that Holland's charge of infringement was well founded, and that USG was in fact infringing Universal's starch patents and had subjected itself to substantial claims for damages by so doing. USG accordingly determined to purchase the starch patents from Universal if it could, and thus relieve itself of substantial claims for infringement. As a result of negotiations between Holland and Avery, USG agreed to purchase and did purchase the Haggerty and Hite patents. Such negotiations were separately and independently conducted by Avery and Holland, and one of the other defendants was involved therein. Since Universal was in receivership, it became necessary to present the entire transaction to seven United States District Courts in which the receivership was pending, wherein the sale to USG by the receivers of Universal was approved. The sale of the starch patents was advantageous to the receivership because it provided Universal with funds which in time helped it to reorganize.

35. Following the purchase of the starch patent by USG from Universal, USG proposed to license its licensees under the bubble and starch patents. The terms and conditions of the license were discussed at a meeting in August, 1929, at which some of the licensees were present, and it was finally left that USG would give the matter further consideration and submit a license containing terms

12261 and conditions satisfactory to it. Each of the licensees was free to accept or reject the license according to its own independent determination.

36. The licenses, in the form of a single document replacing the prior license of the licensee and including the starch patents and bubble board applications, were subsequently mailed to the licensees. Niagara on October 8, 1929, Certain-teed on October 15, 1929, National on October 17, 1929, Ebsary on October 18, 1929, and Atlantic on October 21, 1929, accepted and executed such licenses with USG (Gov. Exs. 12, 10, 9, 11, and 7, respectively).

37. These licenses were separately and independently accepted by Niagara, Certain-teed, National, Ebsary, and Atlantic, respectively, as licensees. There was no agreement or understanding with USG to issue such licenses to them upon the condition that they or any two or more of them would accept identical licenses or that other members of the industry would take similar licenses under such patents. The receivers of Universal did not accept the license until the sale had been approved, and acted pursuant to the order and directions of the said District Courts which had been fully advised of the entire transaction. Neither American nor Texas nor Kelley Plasterboard Company (Kelley) had at this time accepted such a license.

38. On November 5, after approval of the sale, the starch patents were assigned to USG and on the same date the receivers of Universal, as authorized by court, accepted a license (Gov. Ex. No. 6).

39. On November 25, 1929, American settled all of its litigation with USG and accepted a license (Gov. Ex. No. 13).

40. Kelley accepted a license (Gov. Ex. No. 15) 12262 in April of the following year. Texas, a licensee under the Utzman patents, did not accept a license under the starch and bubble patents until 1937, when the machine patent for making closed-edge board expired. This license was executed on February 10, 1937 (Gov. Ex. No. 8).

41. These last four licenses were each separately and independently negotiated and entered into between USG, as licensor, and said receivers, American, Kelley and Texas, respectively, as licensees, and there were no agreements or understandings of any kind with USG to issue identical licenses to them upon the condition that they or any two or more of them would accept such licenses or that other members of the industry would take similar licenses under said patents, but each of them was free to take or not take

the license according to their or its own individual determination except only in so far as said receivers were acting under the order of court.

42. There was not any agreement or understanding among the defendants or any of them that the starch or bubble board patents of USG would be used as a subterfuge to support price control after the expiration of the closed-edge patent, and it is not the fact that those patents were used for any such purpose the use of those patents by each manufacturer was essential in order to avoid possible suits for infringement and in order to obtain the advantages which resulted from the elimination of sawdust from the gypsum core, and from the elimination of the "peeler" problem, and it was for those reasons that each licensee accepted a license under such patents.

12263 43. Newark Plaster Company (Newark) acquired the assets and business of Kelley and became the assignee under Kelley's license in 1939. The Celotex Corporation (Celotex) entered the gypsum industry for the first time when it acquired the assets and business of American in 1939, and became the assignee of its license. Neither of these companies had anything to do with the negotiations or execution of any of the licenses hereinbefore mentioned.

44. In the early 1930's, for the purpose of meeting competition from fiber insulation board, USG developed metallized gypsum board consisting of board with metallis foil. At varying times in 1934 and 1935, each of the licensees of USG, except Texas, signed a license agreement with USG which permitted it to manufacture and sell metallized board under USG's patent rights. Each of such license agreements was separately and independently negotiated by and between the licensor and licensee, and none of such agreements resulted from any agreement or understanding among the defendants or any of them. Each of such licensees accepted its license with the intention to manufacture and sell metallized board under the metallized board licenses.

45. In order to meet the building code requirements found in many localities that a wall structure (the base plus applied coat of plaster) must stand a one-hour fire test, USG developed and had patented during the early 1930's a product called perforated gypsum lath which contained perforations of such size and spacing as to permit a wall structure composed thereof to withstand the one-hour

test. When plaster is applied to this type of lath some of it passes through the perforations and forms a mechanical key, which because of the size and spacing of the holes, supports the coat of plaster with the result that fire, under standard fire test requirements, may be withstood for an hour. USG's perforated lath was the first gypsum lath ever to pass that test. At various times during the years 1936-1939, USG granted licenses under the perforated lath patent to Certain-teed, American Embassy, Kelley and Newark. The earlier of such licenses established minimum prices on perforated lath made and sold by such licensees and provided for the payments of small royalties for the use of the patent; the later licenses were royalty-free. Each of such licenses was independently and separately negotiated by and between the licensor and licensee, and none of such licenses resulted from any agreement or understanding among the defendants or any of them. Each of such license agreements was made in good faith by the parties thereto, and not with the understanding or belief on the part of either of such parties that the perforated lath patent was void.

46. The provisions in the license agreements whereby each licensee agreed to pay as royalty a stipulated percentage of the selling price of all board of every kind, whether or not it was made by patented processes or embodied product claims, were intended as compensation for the privilege of using any or all of the patents as well as a means of providing for the installment payment of damages for infringement for such of those licensees as had infringed the patents, and were insisted upon by the licensor to insure royalty payments due it under the licenses. Such provisions were not inserted in the licenses for the purpose of eliminating the production of unpatented board, nor did they have that effect.

47. The provision in the license agreements forbidding the transfer of the license by the licensee without the licensor's consent was not inserted for the purpose of insuring that the licenses should be industry-wide, but was inserted for the purpose of insuring that a licensee could not avoid the covenants of the license by the sale of its business or transfer of its license and to afford ordinary and customary protection to the licensor in the transfer of licenses under its patents.

48. The provisions in the license agreements to the effect that the licensee's books of account were open to the

licensor, that the licensee was entitled to any more favorable terms granted to any other licensee, for cancellation and other related provisions, were not inserted in the licenses for the purpose of maintaining industry-wide license agreements but for the purpose of protecting the licensor, on the one hand, and the licensee, on the other, with respect to those matters and things common to entering into such contractual relations.

49. USG at all times involved in this suit was engaged in the manufacture and sale of its patented gypsum board and because it was deemed essential by it to do so provided in each of its issued patented licenses that it should have the right to fix the minimum price at which any licensee might sell the patented product. The provision that any minimum price established by the licensor should not be more than the price at which the licensor determined 12266 to sell the patented board to its own like trade in the same market was included solely for the purpose and with the effect of giving assurance that the right reserved by the licensor would not be used to establish a non-competitive minimum price for the licensee. Pursuant to this reservation minimum price bulletins were sent out by USG, as licensor, to its licensees except during the period from August 6, 1929, the date of the expiration of the Utzman Patent No. 1,034,746, to November 5, 1929, the effective date of the so-called November 1929 licenses, and except in the case of the licensee, Texas, during the period from August 6, 1929, to February 10, 1937, the date Texas' first license agreement expired and it acquired a license in substantially the form of the so-called November 1929 licenses. Whether or not the licensor exercised its reserved right to establish prices, and what those prices would be if the right were exercised, was at all times a matter for the sole determination of the licensor; and USG would not at any time discuss such matters with its licensees or prospective licensees or any of them.

50. Neither as a result of the license agreements nor bulletins nor otherwise were the prices of patented gypsum board at any time raised to arbitrary and non-competitive levels or established and maintained at unreasonably high levels.

51 All of the provisions of the price bulletins with respect to terms and conditions of sale had direct relation to the price for such products fixed by the licensor and were not promulgated for the purpose or with the effect of regi-

menting the industry, but solely for the purpose
 12267 of defining the minimum price fixed by the licensor
 in the license agreements, and providing for its
 maintenance on the patented board.

52. The so-called rebate provisions of the price bulletins were issued solely for the purpose of insuring maintenance by the licensees of the minimum price fixed by the licensor and protecting it against indirect reductions by means of secret rebates made for the purpose of reducing the price charged by such licensees below the minimum price, and not for the purpose or with the effect of controlling the prices charged by the licensees for unpatented products.

53. In 1932 USG set up as a department a wholly owned corporation called Board Survey Company. Its function was to receive complaints of license violations, to investigate the facts, call them to the attention of the licensee involved, and upon occasion to the attention of USG. The licensees had no part in the formation, management or operation of Board Survey Company, and its formation, management and operation by USG was not the result of any agreement or understanding among the defendants or any of them. The operations of Board Survey Company were confined to efforts to insure compliance with the licenses and price bulletins and were undertaken solely to protect the rights of USG under the license agreements and patents and its activities were so limited. Board Survey was dissolved in 1937 and no other agency took its place.

54. Defendants did not by agreement or otherwise eliminate the production of open-edge board, and there was not any agreement or understanding among defendants or any
 of them that the production of such board should be
 12268 discontinued. Defendants were free at all times
 to make and sell any type of gypsum board, including open-edge board. The discontinuance of the manufacture of open-edge board was entirely due to economic reasons.

55. Both seconds and No. 2 board were boards made under USG's patents. There was no agreement or understanding among the defendants as to the price to be fixed for the sale of such boards, nor was there any agreement or understanding that such boards would not be manufactured.

56. The license agreements were not executed with any intention to eliminate jobbers. There was no agreement or understanding among the defendants or any of them to eliminate jobbers.

57. The discontinuance of the jobbers' discount provided for in the price bulletins resulted solely from the exercise by USG of its right to establish a price for a patented product. USG did not have any agreement or understanding with the other defendants or any of them that such discount would be discontinued.

58. There was not any agreement or understanding among the defendants or any of them that prices of plaster or any other unpatented gypsum product would be raised, fixed or stabilized, nor did the defendants by any concert of action or otherwise raise, fix or stabilize any such prices.

59. Defendants' prices for plaster and other unpatented products have at all times been highly competitive, and were not in any way affected by the minimum prices established by the licensor for the patented board. The so-called rebate provisions of the price bulletins were not promulgated for the purpose, and did not have the effect of fixing or stabilizing the prices of plaster or other unpatented products; nor did the defendants by complaints addressed to Board Survey Company or by any of its activities fix or stabilize prices of plaster or other unpatented products.

60. There was not any agreement or understanding of any kind between the licensor and any licensee by which any manufacturing distributor or other purchaser of board was required to adhere to any price or term or condition of sale upon the resale of any of the products brought from any of the defendants. There was not any agreement or understanding among the defendants, or any of them, that they would fix or control the resale prices charged by manufacturing distributors or other purchasers for products purchased from any of the defendants, nor did the defendants or any of them fix or control any such resale prices.

61. The principal patents of USG under which license agreements were issued were basic patents and of such scope as to have great commercial value. It was essential that each manufacturer of gypsum board should have the right to use said patents in order to be competitive with those who had such rights.

62. The license agreements hereinbefore referred to were negotiated at arms length and were bona fide agreements entered into in good faith and intended to bind each party thereto to the promises made therein. They were not sham agreements executed to effectuate any purpose

12270 or objective not expressly set forth in the agreement. June 15, 1948.

Respectfully submitted,

BRUCE BROMLEY
MURRAY W. McENIRY
HUGH LYNCH, JR.
*Attorneys for United States
Gypsum Company, Sewell L.
Avery and Oliver M. Knode.*

12271 In the District Court of the United States
For the District of Columbia

(Title Omitted)

(File Endorsement Omitted)

*Offer of Proof by the Defendant, The Celotex Corporation
Filed June 15, 1948*

The Celotex Corporation, pursuant to the request of the Court in this cause, advises the Court that upon hearing of this cause it intends to offer and will, if permitted, offer in its defense competent evidence to prove the facts stated in its answer, including the following:

Celotex entered the gypsum industry for the first time in 1939, when it acquired the assets of The American Gypsum Company, in order to broaden the line of products which it could offer for sale in competition with other manufacturers in the building materials industry. In acquiring such assets, Celotex was required to take over the license between American and United States Gypsum Company which had been entered into by American many years before, on November 25, 1929.

By the terms of the license, American had agreed not to sell all of its assets without requiring the purchaser to assume all of the obligations of American under the license and to agree to be bound by all of the terms and conditions of the license, including the assumption of the claim which United States Gypsum Company had against American for damages for infringement of certain patent.

12272 In the nature of the case, Celotex had no part in the early negotiations with respect to this or any other license involved in this case. The observance by Celotex of any of the terms and provisions of the license, as charged in this case to have been unlawful or improper, was not the result of any voluntary act on the part of Celotex but constituted solely the observance of contractual rela-

tions and obligations which it inherited from American and which it was legally obligated to observe unless it sought to escape the observance thereof on the ground of the invalidity of the terms of the license. Upon Celotex becoming obligated to carry out the terms of the license, it was advised by counsel that the provisions of the license were valid and enforceable and that Celotex was legally obligated to observe the same.

During the sixteen months period to August 15, 1940, the date of the filing of the complaint in this cause, Celotex continued, in the *bona fide* belief that it was obligated legally so to do, to observe the terms of the license. Since July 8, 1941, when Celotex was advised that the Haggerty patent had expired, Celotex has not observed any price limitation under the license, and its observance of the terms of the license has been solely with respect to payments of the royalties payable thereunder in order to prevent the cancellation of the license to use the patents thereunder which Celotex was advised and believed and still believes are valid.

For a concise statement of the state of the record with respect to Celotex, reference is made to the Supplemental Brief for Celotex filed in the Supreme Court of the United States in this case.

12273

Respectfully submitted,

WALTER G. MOYLE

Walter G. Moyle,

RALPH P. WANLASS

Ralph P. Wanlass

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Washington 4, D. C.

Attorneys for The Celotex Corporation

ANDREW J. DALLSTREAM,

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Chicago 4, Illinois,

of Counsel.

12274

In the United States District Court
For the District of Columbia
(Title Omitted)

(File Endorsement Omitted)

Order Enlarging Time—Filed Oct. 30, 1948

And now, October 25, 1948, the time within which the plaintiff herein may file proposed findings of fact and order is hereby enlarged to November 27, 1948.

FINIS J. GARRETT,

Judge

JOSEPH R. JACKSON,

Judge

12275

In the United States District Court
For the District of Columbia
(Title Omitted)

(File Endorsement Omitted)

Order Extending Time—Filed Dec. 10, 1948

Upon the application of Mr. Bruce Bromley in behalf of all of the defendants in the above entitled case for an allowance of sixty days in which to consider and file objections to the Government's "Proposed Findings of Fact and Conclusions of Law", and "Proposed Decree", which were submitted to the Court November 29, 1948, it is, by the Court this 7th day of December, 1948,

ORDERED, That the defendants be and they are hereby granted to and including February 4, 1949, to consider and file such objections.

HAROLD M. STEPHENS,

Judge

FINIS J. GARRETT,

Judge

JOSEPH R. JACKSON,

Judge

12276 In the United States District Court
For the District of Columbia

(Title Omitted)

(File Endorsement Omitted)

Order Extending Time—Filed Feb. 11, 1949.

Upon the application of Mr. Hugh Lynch on behalf of all the defendants in the above entitled case for an allowance of additional time to March 4, 1949, in which to consider and file objections to the government's "Proposed Findings of Fact and Conclusions of Law" and "Proposed Decree", which were submitted to the Court November 29, 1948, government counsel consenting, it is, by the Court this 11th day of February, 1949,

ORDERED, That the defendants be and they are hereby granted to and including March 4, 1949 to consider and file such objections.

HAROLD M. STEPHENS,

Judge

12277 In United States District Court

*Extracts From Memorandum in Opposition
to Plaintiff's Proposed Decree, Findings
and Conclusions—Filed March 4, 1949*

Without waiving our objection to the entry of any decree in favor of plaintiff, we attach hereto, as Exhibit A, a form of decree which, in our view, affords all the relief to which plaintiff may reasonably be held to be entitled under
12278 the decision of this Court upon the motion for summary judgment.

(b) The Proposed Findings and Conclusions

Plaintiff's motion for summary judgment in its favor was filed pursuant to Rule 56 of the Federal Rules of Civil Procedure. Even prior to the 1948 amendment of the Federal Rules of Civil Procedure, it had been uniformly held by the courts that findings of fact and conclusions of law were unnecessary on the decision of motions under Rule 56. *Lindsey v. Leavy*, 149 F. (2d) 899, 902 (C. C. A. 9th, 1945); *Burman v. Lenkin Construction Co.*, 149 F. (2d) 827, 828 (App. D. C., 1945); *Huffman v. Norfolk & Western Ry.*, 71 F. Supp. 564, 565 (W. D. Va., 1947). And the 1948 amendments to the Rules added the following specific provision to Rule 52(a);

"Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b)".

Rule 41 (b) has, of course, no application here. Accordingly, we submit that there is no occasion for the court to make any findings of fact and conclusions of law in this case.

If the Court concludes, nevertheless, to make findings of fact, then we submit that findings naming the defendants, defining the nature of the business in interstate commerce in the eastern area, describing the process of manufacture of gypsum board, the history of the development of the patents and the licensing thereunder, the acceptance of the licenses by the defendants and the issuance of price bulletins thereunder by licensor and the adherence thereto by the defendant licensees with knowledge of the adherence of the others, the organization of Board Survey, Inc. and its activities in investigating performance under the licenses, together with the admissions relied upon by the plaintiff upon its motion for summary judgment to show knowledge among the defendants and concert of action, are ample to support any decree which may properly be entered herein. These constitute the very findings of fact which the Court made with respect to the main issue in the case when it dismissed the complaint (FF 1-21, 31, 60; R. 4132-44, 4148; 4155). For the convenience of the Court, in the event that it should conclude to make separate findings of fact and conclusions of law, we annex hereto, as Exhibit B, all the findings and conclusions which we believe to be proper in the light of the determination made by this Court upon the motion for summary judgment.

. . .

12293

In United States District Court
(File Endorsement Omitted)

*Final Draft of License Agreements Submitted on Behalf of
United States Gypsum Company—Filed July 25, 1949*

Dated: July 23, 1949.

12294

LICENSE AGREEMENT

THIS AGREEMENT, made this day of,
A. D. 1949, by and between UNITED STATES GYPSUM COM-
PANY, an Illinois corporation, of Chicago, Illinois, herein-
after referred to as Licensor, and
....., a corporation, of
....., hereinafter referred to
as Licensee,

WITNESSETH:

that

WHEREAS, one or more gypsum boards (as hereinafter defined) manufactured by Licensee, are made according to the processes or embodying the claims of one or more of the patents hereinafter mentioned, and Licensee desires to obtain a license to make, use, and sell the same through the full term thereof, and Licensor has agreed to grant such license upon the terms and conditions hereinafter stated:

NOW, THEREFORE, in consideration of the sum of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, and of the mutual covenants and agreements hereinafter contained, the parties hereto have agreed as follows, to-wit:

1. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license, and privilege to use the process or processes, and inventions and improvements claimed in any and all of the following letters patent:

12295	Patent Number	Date	Expiration Date
	2017022	October 8, 1935	October 8, 1952
	2079338	May 4, 1937	May 4, 1954
	2080009	May 11, 1937	May 11, 1954

in the manufacture of gypsum board as hereinafter defined, at the plants or factories now owned or operated by Licensee, or at any other plant or factory hereafter owned or operated by it or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and using in the United States of America, and the territories and possessions thereof, gypsum board manufactured under the processes or embodying the inventions and improvements claimed in said patents, for the full term of the last to expire of said letters patents, including any reissues thereon.

Licensor also agrees promptly to disclose to Licensee all information and formulae, not heretofore disclosed to Licensee, which it now has or may obtain relating to the process of making a cellular product through the formation of tenacious foam and mixing the foam with a cementitious material, as set forth and claimed in applications for United States Letters Patent as originally filed by Carlisle K. Roos, Serial Nos. 733197, 3477, and 142155, and by Erik C. Bayer, Serial No. 661723, or in Letters Patent Nos. 207022, 2079338, and 2080009, in so far as the same is or

may be applied to gypsum, and including all information and formulae for the manufacture of gypsum board embodying the inventions and improvements set forth and claimed in the aforesaid applications or letters patent.

2. Licensee agrees to pay to Licensor for the right and privilege granted under Paragraph 1 above a license fee or royalty at the rate of one per cent (1%) of Licensee's selling price of all gypsum board manufactured under 12296 any of the processes or embodying any of the inventions covered by said patents and sold by it during the term hereof, provided that no license fee or royalty shall be payable on gypsum board exported by Licensee to any foreign country.

Licensee's selling price shall mean the net price at Licensee's shipping point after deducting transportation charges and cash discounts allowed by Licensee; provided however, that in the case of laminated gypsum board, except with a metallized surface, the net price for the purposes hereof shall be deemed to be Licensee's net price at the time of sale in the same market area, determined as above provided, for the quantity of plain gypsum board actually used or incorporated therein.

3. The license herein granted shall be personal to the Licensee and shall not be sold, assigned or transferred, either voluntarily, or by operation of law, without the written consent of Licensor; *Provided, however*, that the license may be assigned by Licensee to any company acquiring all of Licensee's gypsum and gypsum board business, and assets pertaining thereto, or all of the capital stock of Licensee, on condition that Licensee shall first obtain, and deliver to Licensor, such assignee's written agreement to assume all of the obligations of Licensee hereunder and agreeing to be bound by all of the terms and conditions hereof.

4. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all gypsum board manufactured under any of the processes or embodying any of the inventions covered by said patents and sold by it, together with the Licensee's 12297 selling price thereof, and agrees that on or before the 20th day of each calendar month it will deliver to Licensor at its office in Chicago, Illinois, true written returns, verified under oath by an officer or other authorized agent of Licensee setting forth the quantity of all such gypsum board manufactured by it, and sold during the preceding calendar month, together with the selling price

thereof as above defined. Licensee also agrees to pay to Licensors at its said office on or before the 20th day of each calendar month the hereinbefore stipulated royalties or license fees which may then be due under the terms of this agreement on account of all such gypsum board manufactured by it, and sold during the preceding calendar month.

5. Licensors, or its duly authorized representative, shall have the right at all reasonable times to inspect the books of account and records of Licensee referred to in Paragraph 4 hereof, and to make copies thereof and memoranda therefrom, *provided, however*, that upon written request of Licensee, such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne equally by the parties. If the parties fail to agree upon the certified public accountant to make such examination, then Licensors shall name three certified public accountants of good standing, not directly or indirectly employed by it or in any other manner connected with it, and if Licensee shall not accept any one of them, then Licensors shall have the right to make such examination itself.

6. Licensee agrees that all gypsum board manufactured and sold by it under or embodying the claims of any of such patents shall be distinctly marked with the word 12298 "Patent" followed by the numbers of any of the aforesaid patents, the claims of which are embodied in said gypsum board, and Licensee further agrees to distinctly mark said gypsum board with the words "Licensed under the above patents and also under the process claims of patent," followed by the number of any of the aforesaid patents of which any process claimed therein is utilized in the manufacture of said product; and Licensee further agrees to distinctly mark said gypsum board with any other appropriate notice as Licensors shall specify from time to time.

7. In the event either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements to be kept or performed by it under the provisions hereof, then the other party may at its election serve upon the party in default written notice of intention to terminate this license and specifying the alleged default. If the party in default shall not cure the default so specified within thirty (30) days thereafter, then the other party may, subject to the provisions of paragraph 8 below, cancel and terminate this agreement without any court action by serving upon the party in default written notice of its elec-

tion so to do; provided, that neither party shall be relieved thereby from any liability accrued at the time of such termination.

8. If a party upon whom a default notice is served under Paragraph 7 above shall deny the specified defaults, in whole or in part, then the right of the other party to terminate this license by reason of the defaults alleged shall be suspended, provided the party served shall (a) within the said thirty (30) day period provided in Paragraph 7 above cure any defaults which are not denied, and 12299 (b) submit to arbitration the question as to whether the specifically denied defaults in fact occurred. In the event the arbitrators find that one or more of the alleged defaults have occurred, then the party in default shall cure the same within thirty (30) days from the date of the finding of such arbitrators. If not cured within said period the party serving such default notice, in addition to and without limitation upon any other rights and remedies which it may have hereunder, may cancel and terminate this agreement without any court action by serving upon the party in default written notice of its election so to do; provided, that neither party shall be relieved thereby of any liability accrued at the time of such termination.

All arbitrations had under this Paragraph 8 shall be in accordance with the Rules then obtaining of the American Arbitration Association, excepting only that the time allowed for objecting to arbitrators, or indicating the order of preference for arbitrators, as submitted to the parties for such purpose by said Association or under its Rules, shall in no event be less than fifteen (15) days. The finding or findings of the arbitrators shall be final and conclusive. In the event the arbitrators shall find any license fees or royalties, or other sums of money herein required to be paid by the Licensee to the Licensor, are due and owing, the arbitrators shall in their findings fix and determine the amount thereof, and Licensor shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the Arbitrators in any court of competent jurisdiction.

12300 9. In the event the Licensee shall at any time be adjudicated a bankrupt, then the license hereunder shall immediately be and become cancelled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination.

10. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any other or further breach or breaches. Either party may specifically enforce this contract, or any of the terms, conditions and covenants thereof, by injunction or in such other manner as may be permitted by law.

11. Any notice required or permitted to be served by either party upon the other under the terms hereof, may be served by mailing the same to the other party, postage prepaid and registered, addressed to such other party at its last known principal office, and the deposit of such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder.

12. In case Licensor shall grant to any other person any license under the aforesaid patents for the manufacture, sale or use of gypsum board made by use of the processes or embodying the claims or inventions claimed in any of said patents, or shall grant any right under any such license, upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms or extend to it the same right granted to any such other person.

13. The term "gypsum board" shall be understood to mean all board made of gypsum, by whatever name
12301 called, having the characteristics of gypsum plaster-board or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths, laminated gypsum board, and all other gypsum boards. The term "laminated gypsum board;" means a unit or assembly of units consisting of a gypsum board having attached to one or both faces thereof a layer or layers of gypsum board, insulation board, decorated paper simulating wood veneers or tile, or other material, but as used in the proviso to Paragraph 2 above shall not include gypsum board having a metallized surface.

14. If Licensor shall at any time during the existence of this agreement make or obtain any improvement for the formation of the bubbles or foam described in the process set forth in applications for United States Letters Patent as originally filed by Carlisle K. Roos, Serial No. 733197, 3477, and 142155, and by Erik C. Bayer, Serial No. 661723, or in Letters Patent Nos. 2017022, 2079338, and 2080009, or the method of its introduction into the core of gypsum board, and which improvement is covered by the claims of the aforesaid applications and letters patent, and shall itself use the same in its own manufacture, then so long

as Licensee shall continue to pay the license fees or royalties hereinbefore stipulated, the right, license or privilege herein contained shall be extended to and include the use of said improvement in the manufacture by Licensee of gypsum board, subject to all of the terms and conditions herein contained, except only that Licensee shall not be required to pay any additional royalty or license fee therefor. It is further agreed that if a patent or patents shall be granted or issued for or upon said improvement, then all of the provisions of this agreement shall apply to the improvement set forth and claimed in any such patent or patents.

12302 Licenseor will promptly notify Licensee of the general adoption by it of any such improvement in its own manufacture, together with such information as it may possess as to the use thereof in the manufacture of gypsum board.

15. The Licenseor agrees at any time during the term hereof to extend to Licensee, upon its written request, an indivisible and non-exclusive license or privilege to use the process or processes set forth and claimed in said Letters Patent Nos. 2017022, 2079338, and 2080009, in the manufacture in Licensee's plants of any other gypsum product not specifically covered by this agreement, and in which product Licenseor shall use the same in its own manufacture, and to sell the same, upon the payment to Licenseor of One per cent (1%) of Licensee's selling price of all of such other gypsum product or products (in the manufacture of which said process or processes are used), manufactured and sold by Licensee, upon the same terms as set forth herein and subject to all of the conditions hereof, in which event in the agreement for the same there shall be substituted for the words "gypsum board" the name of such other product or products. An agreement containing all of said terms and conditions shall be reduced to writing and signed by both parties before the same shall become effective.

16. This agreement shall be effective as of the day of, 1949.

IN WITNESS WHEREOF the parties hereto have caused these presents to be signed in duplicate by their
12303 respective presidents, attested by their respective secretaries, and their corporate seal to be hereunto affixed, the day and year first above written.

UNITED STATES GYPSUM COMPANY

By

President

ATTEST:

.....
Secretary.....
.....
President

ATTEST:

.....
Secretary

12304

LICENSE AGREEMENT

THIS AGREEMENT, made this day of
, A. D. 1949, by and between UNITED STATES
 GYPSUM COMPANY, an Illinois corporation, of Chicago,
 Illinois, hereinafter referred to as Licensors, and
, a corporation, of
, hereinafter referred to as Licensee,

WITNESSETH:

That, WHEREAS, Licensors is the owner of United States
 Letters Patent No. 1,938,354 relating to a perforated
 gypsum board particularly adapted for fire-resistant wall
 and ceiling construction and structures as covered by the
 claims of said patent; and

WHEREAS, Licensee desires an indivisible and non-exclu-
 sive license from Licensors herein, to manufacture, use and
 sell perforated gypsum board embodying the inventions
 and improvements set forth and claimed in said Letters
 Patent No. 1,938,354 upon the terms and conditions herein-
 after set forth;

Now, THEREFORE, in consideration of the mutual covenants
 and agreements hereinafter contained, the parties hereto
 agree as follows, to-wit:

1. Licensors agrees to and does hereby give and grant un-
 to Licensee an indivisible and non-exclusive right, License
 and privilege of manufacturing, at the plants or factories
 now or hereafter owned or operated by Licensee or any
 subsidiary, associated or affiliated company, perforated
 gypsum board embodying the inventions and improvements
 set forth and claimed in said Letters Patent No.
 12305 1,938,354, and of selling and using in the United
 States of America, and the territories and posses-
 sions thereof, said perforated gypsum board manufactured
 by Licensee as aforesaid, for the full term of said Letters
 Patent, including any reissue thereof.

2. Licensee agrees to pay to Licensor for the right and privilege granted under Paragraph 1 above a License fee or royalty, for all perforated gypsum board, embodying any of the inventions and improvements set forth and claimed in said Letters Patent, which is manufactured and sold by Licensee during the term hereof, at the rate of ten cents (10¢) per thousand square feet of surface area, provided that no license fee as royalty shall be payable on perforated gypsum board exported by Licensee to any foreign country.

3. The license herein granted shall be personal to the Licensee and shall not be sold, assigned or transferred, either voluntarily or by operation of law, without the written consent of Licensor; *Provided*, however, that the license may be assigned by Licensee to any company acquiring all of Licensee's gypsum and gypsum board business, and assets pertaining thereto, or all of the capital stock of Licensee, on condition that Licensee shall first obtain, and deliver to Licensor, such assignee's written agreement to assume all of the obligations of Licensee hereunder and agreeing to be bound by all of the terms and conditions hereof.

4. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of perforated gypsum board manufactured and sold by it under the right, license and privilege herein granted, and 12306 agrees that on or before the 20th day of each calendar month it will deliver to Licensor at its office in Chicago, Illinois, true written returns, verified under oath by an officer or other authorized agent of Licensee setting forth the quantity of all such perforated gypsum board manufactured by it, and sold during the preceding calendar month. Licensee also agrees to pay to Licensor at its said office on or before the 20th day of each calendar month the hereinbefore stipulated royalties, or license fees which may then be due under the terms of this agreement on account of all such perforated gypsum board manufactured by it, and sold during the preceding calendar month.

5. Licensor, or its duly authorized representative, shall have the right at all reasonable times to inspect the books of account and records of Licenses referred to in Paragraph 4 hereof, and to make copies thereof and memoranda therefrom, *provided, however*, that upon written request of Licensee, such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be born equally by the parties. If the parties fail to agree upon the certified public

accountant to make such examination, then Licensor shall name three certified public accountants of good standing, not directly or indirectly employed by it or in any other manner connected with it, and if Licensee shall not accept any one of them, then Licensor shall have the right to make such examination itself.

6. Licensee agrees that all perforated gypsum board manufactured and sold by it under or embodying any of the claims of said Letters Patent shall be distinctly marked "Patent No. 1,938,354", and with the further words "Licensed under the above patent". Licensee further agrees to distinctly mark said perforated gypsum board with such other appropriate notice as Licensor shall specify from time to time.

7. In the event either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements to be kept or performed by it under the provisions hereof, then the other party may at its election serve upon the party in default written notice of intention to terminate this license and specifying the alleged default. If the party in default shall not cure the default so specified within thirty (30) days thereafter, then the other party may, subject to the provisions of paragraph 8 below, cancel and terminate this agreement without any court action by serving upon the party in default written notice of its election so to do; provided, that neither party shall be relieved thereby from any liability accrued at the time of such termination.

8. If a party upon whom a default notice is served under Paragraph 7 above shall deny the specified defaults, in whole or in part, then the right of the other party to terminate this license by reason of the defaults alleged shall be suspended, provided the party served shall (a) within the said thirty (30) day period provided in Paragraph 7 above cure any defaults which are not denied, and (b) submit to arbitration the question as to whether the specifically denied defaults in fact occurred. In the event the arbitrators find that one or more of the alleged defaults have occurred, then the party in default shall cure the same within thirty (30) days from the date of the finding of such arbitrators. If not cured within said period the party serving such default notice, in addition to and without limitation upon any other rights and remedies which it may have hereunder, may cancel and terminate this agreement without any court action by serving upon the party in default written notice of its election

so to do; provided, that neither party shall be relieved thereby of any liability accrued at the time of such termination.

All arbitrations had under this Paragraph 8 shall be in accordance with the Rules then obtaining of the American Arbitration Association, excepting only that the time allowed for objecting to arbitrators, or indicating the order of preference for arbitrators, as submitted to the parties for such purpose by said Association or under its Rules, shall in no event be less than fifteen (15) days. The finding or findings of the arbitrators shall be final and conclusive. In the event the arbitrators shall find any license fees or royalties, or other sums of money herein required to be paid by the Licensee to the Licensor, are due and owing, the arbitrators shall in their findings fix and determine the amount thereof, and Licensor shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the Arbitrators in any court of competent jurisdiction.

9. In the event the Licensee at any time be adjudicated a bankrupt, then the license hereunder shall immediately be and become cancelled and terminated, but the Licensor shall not thereby be prevented from collecting all licensee fees or royalties accrued hereunder at the time of such termination.

12309 10. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any other or further breach or breaches. Either party may specifically enforce this contract, or any of the terms, conditions and covenants thereof, by injunction or in such other manner as may be permitted by law.

11. Any notice required or permitted to be served by either party upon the other under the terms hereof, may be served by mailing the same to the other party, postage prepaid and registered, addressed to such other party at its last known principal office, and the deposit of such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder.

12. In case Licensor shall grant to any other person any license under the aforesaid Letters Patent for the manufacture, sale or use of perforated gypsum board embodying the claims or inventions claimed in said patent, or shall grant any right under any such license, upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same

terms or extend to it the same right granted to any such other person.

13. Nothing herein contained shall be construed as granting any right, license or privilege under any Letters Patent other than Letters Patent No. 1,938,354, and it is understood that the royalties provided herein are in addition to the royalties or license fees provided under any other license agreement which may now or hereafter exist between the parties.

14. This agreement shall be effective as of the day of, 1949.

12310 IN WITNESS WHEREOF the parties hereto have caused these presents to be signed in duplicate by their respective presidents, attested by their respective secretaries, and their corporate seals to be hereunto fixed, the day and year first above written.

UNITED STATES GYPSUM COMPANY

By
President

ATTEST:

.....
Secretary

.....
President

ATTEST:

.....
Secretary

12311

LICENSE AGREEMENT

THIS AGREEMENT made this day of, A. D. 1949, by and between UNITED STATES GYPSUM COMPANY, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and a corporation, of, hereinafter referred to as Licensee,

WITNESSETH:

That in consideration of the mutual covenants and agreements herein contained, the parties hereto agree as follows, to-wit:

1. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license, and privilege to make and use the machines and inventions set forth and claimed in United States Letters Patent No.

1946056 dated February 6, 1934, and expiring February 6, 1951, at the plants or factories now owned or operated by Licensee, or at any other plant or factory hereafter owned or operated and controlled by Licensee or any subsidiary, associated or affiliated company of Licensee, for the full term of said letters patent, including any reissue therefor.

2. Licensee agrees to pay to Licensor for the right and privilege granted under Paragraph 1 above a license fee or royalty of ten cents (10¢) per one thousand (1,000) square feet of gypsum board bundled with a machine constructed according to any one or more of the claims set forth or claimed in said letters patent, and sold by Licensee during the term hereof.

12312 3. The license herein granted shall be personal to the Licensee and shall not be sold, assigned, or transferred, either voluntarily or by operation of law, without the written consent of Licensor, *provided, however*, that this license may be assigned by Licensee to any company acquiring all of Licensee's gypsum and gypsum board business, and assets pertaining thereto, or all of the capital stock of Licensee, on condition that Licensee shall first obtain, and deliver to Licensor, such assignee's written agreement to assume all of the obligations of Licensee hereunder, and agreeing to be bound by all of the terms and conditions hereof.

4. Licensee agrees to keep separate, full, and accurate books of account and records showing the exact quantity of all gypsum board bundled with a machine constructed according to any one or more of the claims set forth and claimed in said letters patent, and sold by Licensee, and agrees that on or before the 20th day of each calendar month it will deliver to Licensor at its office in Chicago, Illinois, true written returns verified under oath by an officer or other authorized agent of Licensee, setting forth the quantity of all such gypsum board bundled by it with a machine constructed according to any one or more of the claims set forth in said letters patent, and sold during the preceding calendar month. Licensee also agrees to pay to Licensor at its said office, on or before the 20th day of each calendar month, the hereinbefore stipulated royalty or license fee which may then be due under the terms of this agreement on account of said gypsum board bundled by it as aforesaid, and sold during the preceding calendar month.

12313 5. Licensor, or its duly authorized representative, shall have the right at all reasonable times to

inspect the books of account and records of Licensee referred to in Paragraph 4 hereof, and to make copies thereof and memoranda therefrom, provided that upon written request of Licensee such examination shall be made by a certified public accountant satisfactory to Licenser, in which event the expense of such examination shall be borne equally by the parties.

6. Licensee agrees that all bundles of gypsum board bundled by it with a machine constructed according to any one or more of the claims set forth and claimed in said letters patent, shall be distinctly marked "Machine used in making this bundle covered by Patent No. 1,946,056," and Licensee further agrees to distinctly mark said bundles with such other appropriate notice as Licenser shall specify from time to time.

7. In the event either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein agreed to be kept or performed by it, then the other party may at its election serve upon the party in default written notice of intention to terminate this license, which notice shall specify the alleged default. If the party in default shall not cure the default so specified within thirty (30) days after such notice, then the other party may, subject to the provisions of Paragraph 6 below, cancel and terminate this agreement, without any court action, by serving upon the party in default written notice of its election so to do; provided, that neither party shall be relieved thereby from any liability accrued at the time of such termination.

12314 8. If a party upon whom a default notice is served under Paragraph 7 above shall deny the specified defaults, in whole or in part, then the right of the other party to terminate this license by reason of the defaults alleged shall be suspended, provided the party served shall (a) within the said thirty (30) day period provided in Paragraph 7 above cure any defaults which are not denied, and (b) submit to arbitration the question as to whether the specifically denied defaults in fact occurred. In the event the arbitrators find that one or more of the alleged defaults have occurred, then the party in default shall cure the same within thirty (30) days from the date of the finding of such arbitrators. If not cured within said period the party serving such default notice, in addition to and without limitation upon any other rights and remedies which it may have hereunder, may cancel and terminate this agreement, without

any court action, by serving upon the party in default written notice of its election so to do; provided, that neither party shall be relieved thereby of any liability accrued at the time of such termination.

All arbitrations had under this Paragraph 8 shall be in accordance with the Rules then obtaining of the American Arbitration Association, excepting only that the time allowed for objecting to arbitrators or indicating the order of preference for arbitrators, as submitted to the parties for such purpose by said Association or under its Rules, shall in no event be less than fifteen (15) days. The finding or findings of the arbitrators shall be final and conclusive. In

the event the arbitrators shall find that any license
12315 fees or royalties or other sums of money herein required to be paid by the Licensee to the Licensor, are due and owing, the arbitrators shall in their findings fix and determine the amount thereof, and Licensor shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the arbitrators in any court of competent jurisdiction.

9. In the event the Licensee shall at any time be adjudicated a bankrupt, then the license hereunder shall immediately be and become cancelled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination.

10. Nothing herein contained shall be construed as constituting a license for the manufacture, use or sale of gypsum board under any other patents or patent rights of Licensor, or as extending the term of any such license heretofore or hereafter granted by any other agreement between the parties hereto, and the royalty provided herein is in addition to any royalties or license fees provided in any such other agreement.

11. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any other or further breach or breaches. Either party may specifically enforce this contract, or any of the terms, conditions and covenants thereof, by injunction or in such other manner as may be permitted by law.

12316 12. Any notice required or permitted to be served by either party upon the other under the terms hereof, may be served by mailing the same to the other party, postage prepaid and registered, addressed to such party at its last known principal office, and the deposit of

such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder.

13. In case Licensor shall grant to any other person a license under the aforesaid patent upon terms more favorable than those granted hereunder to this Licensee, then it will grant to the Licensee herein a license on the same terms granted to any such other person.

14. The term "gypsum board" shall be understood to mean all board made of gypsum, by whatever name called, having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths and all other gypsum boards.

15. This agreement shall be effective as of the day of, 1949.

IN WITNESS WHEREOF the parties hereto have caused these presents to be signed by their respective presidents, attested by their respective secretaries, and their corporate seals to be hereunto affixed in duplicate the day and year first above written.

UNITED STATES GYPSUM COMPANY

By
President

By
President

ATTEST:

.....
Secretary

ATTEST:

.....
Secretary

12317

LICENSE AGREEMENT

THIS AGREEMENT, made this.....day of....., A. D. 1949, by and between UNITED STATES GYPSUM COMPANY, an Illinois corporation, of Chicago, Illinois, herein-after referred to as Licensor, and....., acorporation, of....., hereinafter referred to as Licensee,

WITNESSETH:

That, WHEREAS, Licensor is the owner of United States Letters Patent No. 1,914,345 relating to wall construction

(hereinafter referred to as the Roos Patent), and is also the owner of certain patent rights set forth in Schedule A hereunto annexed, relating to building structures or elements for said structures; and

WHEREAS, Licensee desires an indivisible and non-exclusive license from Licensör herein, to manufacture, use and sell gypsum board under said Roos Patent and under said patent rights set forth in Schedule A hereof, and Licensör has agreed to grant such license upon the terms and conditions, but subject to the limitations hereinafter stated;

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto agree as follows, to-wit:

1. Licensör agrees to and does hereby give and grant unto Licensee the indivisible and non-exclusive right, license, and privilege to make, use, and sell gypsum board having a metallized surface, embodying the inventions disclosed and claimed in said Roos Patent and in the patents set forth in Schedule A, or in any of them; Provided, that the right, license, and privilege herein and hereby granted is specifically limited to the gypsum board and building structures incorporating the same as set forth in Schedule A, and does not extend to any other product or structure.

2. Licensee agrees to pay to Licensör for the right and privilege granted under Paragraph 1 above, a royalty for all gypsum board having a metallized surface manufactured and sold by Licensee and which is covered by the claims of said Roos Patent or the patents set forth in Schedule A, or which is to be used in making structures covered by said patent or patent rights, at the rate of forty cents (40¢) per thousand square feet of surface area where only one face is metallized, and at the rate of fifty cents (50¢) per thousand square feet where both faces are metallized, of any product covered by the aforesaid patent or any of said patent rights.

3. The license herein granted is personal to the Licensee and shall not be sold, assigned or transferred, either voluntarily or by operation of law, without the written consent of Licensör; Provided, however, that the license may be assigned by Licensee to any company acquiring all of Licensee's gypsum and gypsum board business, and assets pertaining thereto, on condition that Licensee shall first obtain, and deliver to Licensör, such assignee's written agreement to assume all of the obligations of Licensee

hereunder and agreeing to be bound by all of the terms and conditions hereof.

4. In case Licensor shall grant to any other person any license under the aforesaid patent or patent rights for the manufacture, sale or use of gypsum board having a metallized surface and embodying the claims or inventions set forth and claimed therein, upon terms more favorable than those granted hereunder to Licensees, then Licensor shall grant to Licensee a license upon the same terms, or will extend to Licensee the same right granted to such other licensee.

5. Licensee agrees to keep true and accurate books of account showing the quantity of all gypsum board having one or more metallized surfaces, manufactured and sold by it under the rights, licenses, and privileges herein granted. Such books and records shall at all times during business hours be open to the inspection of Licensor or its duly authorized representative, and Licensor shall have the right to make copies thereof and memoranda therefrom, provided that upon written request of Licensee such examination shall be made by a certified public accountant satisfactory to Licensor, in which event the expense thereof shall be borne equally by the parties.

6. Licensee agrees that on or before the 15th day of each calendar month it will deliver to Licensor at its office in Chicago, Illinois, a written report, verified by an officer or other authorized agent of Licensee, showing the quantity of all such gypsum board manufactured by it (a) having one metallized surface, and (b) having two metallized surfaces, and sold during the preceding calendar month. Licensee also agrees to pay to Licensor at its said office on or before the 15th day of each calendar month the hereinbefore stipulated royalty which may then be due under the terms of this agreement on account of all such gypsum board so sold by Licensee during the preceding calendar month. For the purposes of this agreement a sale shall be considered to have been made not later than the date on which the goods are shipped by Licensee, without regard to passing of title or whether the goods are shipped on consignment, or otherwise.

12320 7. Licensee agrees that all gypsum board having one or more metallized surfaces sold by it hereunder shall be distinctly marked with the word "Patent" followed by the number of any of the aforesaid patents, the claims of which are embodied in said gypsum board, and with the words "Wall structures having hollow spaces

faced by said metallized surfaces, also covered by Patent No. 1,914,345"; and also with the words "Licensed under the above patents". Licensee further agrees to distinctly mark said gypsum board with such other appropriate notice as Licensor shall specify from time to time.

8. In the event Licensee shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements to be kept or performed by it under the provisions hereof, then Licensor may at its election serve upon Licensee written notice specifying the alleged default and stating, if Licensor so desires, its intention to terminate this license. If Licensee shall not cure the default so specified within thirty (30) days thereafter, then Licensor may, subject to the provisions of Paragraph 9 below, maintain any appropriate action hereunder, at law or in equity, for collection of royalties, or for damages, or for any other appropriate remedy, or Licensor may, if such intention was stated in the notice of default, cancel and terminate this agreement without any court action, by serving upon Licensee written notice of its election so to do; provided, that Licensee shall not be relieved thereby from any liability accrued at the time of such termination.

9. If Licensee shall deny, in whole or in part, the defaults specified in a notice served by Licensor under Paragraph 8 above, then Licensor's right to proceed as
12321 provided in Paragraph 8 above shall be suspended, provided Licensee shall (a) within the said thirty (30) day period provided in Paragraph 8 above cure any defaults which are not denied, and (b) submit to arbitration the question as to whether the specifically denied defaults in fact occurred. In the event the arbitrators find that one or more of the alleged defaults have occurred, then Licensee shall cure the same within thirty (30) days from the date of the finding of such arbitrators. If not cured within said period then Licensor may proceed in such manner as it may elect as provided in Paragraph 8 above.

All arbitrations had under this Paragraph 9 shall be in accordance with the Rules then obtaining of the American Arbitration Association, excepting only that the time allowed for objecting to arbitrators, or the order of preference for arbitrators, as submitted to the parties for such purpose by said Association, or under its Rules, shall in no event be less than fifteen (15) days. The finding or findings of the arbitrators shall be final and conclusive. In the event the arbitrators shall find any royalties, or other sums of money herein required to be paid by the Licensee to the

Licensors, are due and owing, the arbitrators shall in their findings fix and determine the amount thereof, and Licensors shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the arbitrators in any court of competent jurisdiction.

10. In the event (a) that Licensee shall be adjudicated a bankrupt, or (b) a receiver shall be appointed for Licensee, whose appointment shall not be vacated within sixty
12322 (60) days thereafter, then the rights, licenses, and privileges herein granted to Licensee shall forthwith cease and determine, without further action on the part of the Licensors, provided that such termination shall not relieve Licensee of any liability then existing.

11. The waiver by Licensors of any breach on the part of Licensee shall not be interpreted as constituting a waiver of any further or other breach or breaches.

12. Any notice required or permitted to be served by either party upon the other under the terms hereof, may be served by mailing the same to the other party, postage prepaid and registered, addressed to such party at its last known principal office, and the deposit of such notice in the United States mails, registered, postage prepaid and so addressed, shall constitute service of notice hereunder.

13. The term "gypsum board" shall be understood to mean all board made of gypsum, by whatever name called, having the characteristics of gypsum plasterboard or gypsum wall-board, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths, laminated gypsum board, and all other gypsum boards.

14. Except as otherwise provided herein, this agreement shall remain in force for the full term of the last to expire of the Roos Patent and the patent rights set forth in Schedule A, and shall be binding upon and inure to the benefit of the parties hereto and their successors and assigns; provided that nothing in this paragraph contained shall be construed to permit any assignment hereof except as herein otherwise specifically provided. Nothing herein contained shall be construed to relieve Licensee from
12323 the payment of royalties under license agreement of even date herewith under Letters Patent Nos. 2017022, 2079338, 2080009, and 1938354, it being understood that the royalties provided herein are in addition to the royalties or license fees provided in such other agreement. In the event the exclusive right and license of Licensors as set forth in Schedule A hereof shall terminate for any rea-

son whatever, whether on account of Licensor's default or otherwise, and such termination shall result in the termination of any of the rights, licenses and privileges herein granted to the Licensee, then this agreement shall immediately terminate without further act on the part of either of the parties hereto (subject however to revival and continuation as hereinafter provided), and without liability of any kind by Licensor to Licensee on account thereof, provided that Licensee shall not thereby be released from any then existing liability to Licensor. Licensor agrees that if its said exclusive right and license shall be so terminated, it will promptly notify Licensee thereof and, if Licensee's rights shall have terminated as aforesaid, then upon the written request of Licensee made to Licensor at any time within sixty (60) days after the giving of such notice, this license agreement shall continue in effect as to said Roos Patent, upon and subject to all the terms, provisions, and conditions hereof to the extent the same are applicable; provided however, that in such event it is expressly understood and agreed that Licensor shall not be liable to Licensee in any way, directly, or indirectly, for or by reason of any infringement or claimed infringement of the patents listed in Schedule A hereof.

15. Licensor hereby represents and warrants that it has the right to grant the license herein granted.

16. This agreement shall be effective as of the day of _____, 1949.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

UNITED STATES GYPSUM COMPANY

By
President

Attest:

.....
Secretary

By
President

Attest:

.....
Secretary

12325,

SCHEDULE A

Licensors has the exclusive right and license to make, use and sell building structures or elements for building structures where insulation is obtained by the use of gypsum board having a metallized surface under the following patents, known as the Alfol patents:

<i>Inventor</i>	<i>Patent No.</i>	<i>Issue Date</i>
Schmidt	1,890,418	December 6, 1932
Dykerhoff	1,934,174	November 7, 1933
Schmidt	2,015,817	October 1, 1935

together with any divisions, continuations, renewals or reissues thereof, but it is understood that the terms "building structures" is limited to the walls, floors of and ceilings of buildings and does not include pipes or ducts, or other heating apparatus installed in the building, or refrigerating or cooling apparatus or structures whether built into the building or not. Licensors has no right or license under the said patents to use metal foil for insulation except where such foil is applied to a non-metallie member as a facing therefor.

12340 In the District Court of the United States
For the District of Columbia
(File Endorsement Omitted)

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; HENRY J. HARTLEY; and FREDERICK TOMKINS, DEFENDANTS.

Preliminary Statement

This cause came on for trial before this Court on November 15, 1943. At the conclusion of plaintiff's presentation of the case, defendants moved, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, for judgment dismissing the complaint on its merits. The motion of defendants was granted August 6, 1946. The judgment so

rendered by this Court was reversed by the Supreme Court of the United States, and the case was remanded to this Court for further proceedings in conformity with the opinion of the Supreme Court (333 U. S. 364).

Following the remand, the plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, moved for summary judgment in its favor upon the pleadings and all of the proceedings which theretofore had been had in the case, or, in the alternative, for such further proceedings as this Court might direct, and defendants, by direction of the Court, filed proffers of proof.

12341 Argument by counsel for the respective parties upon the motion of plaintiff was heard by the Court, and after due consideration of such argument and of defendants' proffers of proof, Garrett, J. and Jackson, J., constituting a majority of the Court, announced a ruling to the effect that plaintiff's motion for summary judgment would be granted, and Stephens, J., who presided during the trial, announced his dissent from such ruling.

Thereafter counsel for plaintiff and counsel for certain of the defendants submitted forms of final decrees for the consideration of the Court and also suggested findings of fact, the latter to be considered in the event the Court should deem it necessary to make any findings of fact additional to those originally found by it and to those stated in the opinion of the Supreme Court.

In due course, the Court heard arguments respecting the proposed decrees and the suggested findings of fact, and full consideration has been given thereto and to all prior proceedings—all being considered in the light of the decision of the Supreme Court which, as understood by the majority of this Court, held that the defendants acted in concert to restrain trade and commerce in the gypsum board industry and monopolized said trade and commerce among the several states in that section hereinafter referred to as the eastern territory of the United States, which section embraces all the states of the United States westward from the eastern coast thereof to the Rocky Mountains and including New Mexico, Colorado, Wyoming, and the eastern half of Montana.

DECREE

The motion of plaintiff for a summary judgment is sustained and in conformity with the decision of the Supreme

12342 Court, as understood by the majority of this Court, and in obedience to its mandate, it is ordered, adjudged and decreed:

ARTICLE I

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a cause of action against defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", commonly known as the Sherman Anti-trust Act, and acts amendatory thereof and supplemental thereto,

ARTICLE II

As used in this decree:

1. "Defendant companies" shall mean all of the corporate defendants and Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company.

2. The "Patents" shall mean United States Letters Patent and applications for United States Letters Patent owned by defendant United States Gypsum Company which are described in the Patent Licenses, as hereinafter defined, and continuations in whole or in part, renewals, reissues, divisions, and extensions thereof.

3. "Gypsum board" shall mean plaster board or lath (including perforated and metallized lath) and wallboard (including metallized wallboard) made from gypsum and embodying any of the inventions or improvements set forth and claimed in any of the Patents.

4. "Patent Licenses" shall mean the patent license agreements which were in effect between defendant United States Gypsum Company and each of the other defendant companies at the time the complaint herein was filed and described in said complaint as follows:

Agreement dated October 15, 1929, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee;

12343 Agreement dated October 17, 1929, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee;

Agreement dated October 18, 1929, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee;

Agreement dated November 5, 1929, between United States Gypsum Company, as licensor, and Universal

Gypsum and Lime Company (National Gypsum Company, as Assignee), as licensee;

Agreement dated November 25, 1929, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee;

Agreement dated April 23, 1930, between United States Gypsum Company as licensor, and Kelley Plasterboard Company (Newark Plaster Co. as Assignee), licensee;

Agreement dated February 10, 1937, between United States Gypsum Company, as licensor, and Texas Cement Plaster Company, as licensee;

Agreement dated October 5, 1934, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee (Metallized board);

Agreement dated October 12, 1934, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Metallized board);

Agreement dated November 2, 1934, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Metallized board);

Agreement dated December 4, 1934, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee (Metallized board);

Agreement dated August 14, 1935, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Metallized board);

Agreement dated June 8, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

12344 Agreement dated February 2, 1937, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated June 23, 1937, between United States Gypsum Company, as licensor, and Kelley Plaster-

board Company (Newark Plaster Company, as Assignee), as licensee (Perforated lath); Agreement dated January 3, 1939, between United States Gypsum Company, as licensor, and Newark Plaster Company, as licensee (perforated lath), and any supplement or amendment to any of said patent license agreements.

ARTICLE III

The defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of sections 1 and 2 of the Sherman Antitrust Act.

ARTICLE IV

Each of the license agreements listed in Article II hereof is adjudged unlawful under the anti-trust laws of the United States and illegal, null and void.

ARTICLE V

Each of the defendant companies and each of their respective officers, directors, agents, employees, representatives, subsidiaries, and any person acting or claiming to act under, through or for them or any of them are hereby enjoined and restrained from

(1) the further performance or enforcement of any of the provisions of the Patent Licenses, including any price bulletin issued thereunder;

12345 (2) entering into or performing any agreement or understanding among the defendants or any of them for the purpose or with the effect of continuing, reviving or reinstating any monopolistic practice.

(3) entering into or performing any agreement or understanding among the defendants or any of them in restraint of trade and commerce in gypsum board among the several states in the eastern territory of the United States by license agreements to fix, maintain or stabilize prices of gypsum board or the terms and conditions of sale thereof.

ARTICLE VI

1. Defendant United States Gypsum Company is hereby ordered and directed to grant to each applicant therefor within 90 days after the effective date hereof, but only in

so far as it has the right to do so, a non-exclusive license to make, use and vend under any, some, or all patents and patent applications now owned or controlled by it relating to gypsum board, provided that such license agreement fixes a royalty not to exceed the royalty of the same article or process fixed in the license agreements set out in Article II hereof.

2. Defendant United States Gypsum Company is hereby enjoined and restrained from making any sale or other disposition of any of said patents or patent applications which would deprive it of the power or authority to grant such licenses, unless in any sale, transfer or assignment it shall be required that the purchaser, transferee or assignee shall observe the provisions of this section.

ARTICLE VII

Nothing contained in this decree shall be deemed to have any effect upon the operations or activities of said
12346 defendants which are authorized or permitted by the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or the Act of Congress of August 17, 1937, commonly called the Miller-Tydings Act, or by any present or future act of Congress or amendment thereto; provided, however, nothing contained in this article shall in any manner affect the provisions of Article VI of this decree.

ARTICLE VIII

The forms of license agreement which the Court has this day ordered filed herein are hereby approved; and the tender by defendant United States Gypsum Company to each applicant for a license agreement containing the terms and conditions set forth in the applicable filed form or forms shall constitute compliance by defendant United States Gypsum Company with the provisions of Article VI.

ARTICLE IX

Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this decree, or any other person, firm or corporation that may hereafter become bound thereby in whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of this decree, and (2) for the enforcement of compliance therewith.

ARTICLE X

Judgment is entered against the defendant companies for 50% of the costs to be taxed in this proceeding, and the costs so to be taxed are hereby prorated against the several defendant companies as follows:

United States Gypsum Company....	55%
National Gypsum Company.....	23%
Certain-teed Products Corporation..	11%
The Celotex Corporation.....	3%
Ebsary Gypsum Company, Inc.....	3%
Newark Plaster Company.....	4%
Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company	1%

Let the decree be entered.

FINIS J. GARRETT

Finis J. Garrett, J.

JOSEPH R. JACKSON

Joseph R. Jackson, J.

STEPHENS, J., dissents from the entry of a summary judgment against the defendants. In his view the defendants should be permitted to present their offered proof upon the issues of fact raised by their answers to the Government's complaint, and the court should then hear argument from counsel for the parties and, after weighing the evidence of both the Government and the defendants, make findings of fact and conclusions of law anew and render judgment according thereto.

HAROLD H. STEPHENS

Harold M. Stephens, J.

DATED: November 7, 1949.

12348 In United States District Court
UNITED STATES

v.

UNITED STATES GYPSUM COMPANY, *et al.*

Civil Action No. 8017,

District Court of the United States for the
District of Columbia

*Opinion by Stephens, J., on Motion for Summary Judgment
—Filed Nov. 7, 1949*

STEPHENS, J.: I think that the entry of a summary judgment against the defendants is not warranted. The case

was before the Supreme Court for review of the correctness of the trial court's mid-trial dismissal, under Rule 41 (b), Federal Rules of Civil Procedure, of the Government's complaint. The dismissal was after the Government had completed presentation of the evidence which it relied upon to sustain the charges in its complaint, but before any evidence had been presented by the defendants. As I read its opinion the Supreme Court determined that the Government's evidence established *prima facie* the violations of the Sherman Act, or some of them, charged in the Government's complaint. But these charges—outlined in paragraphs 44-46(a) inclusive, and detailed in paragraphs 47-123 inclusive, of the complaint are denied by the defendants' answers.¹ Hence there remain in the case genuine

issues of material fact. This forbids the entry of a summary judgment for under Rule 56 (c), Federal Rules of Civil Procedure, such a judgment can be rendered only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

¹ The charges reduce themselves in essence to the following: (1) That the license contracts entered into between the defendant USG, as licensor, and the other defendants, as licensees, are themselves illegal as in restraint of trade in view of the nature of the patents upon which the contracts are based, in view of the fact that USG and the plurality of defendant licensees manufacture all of the gypsum board in the "Eastern area," and in view of the terms and conditions of the contracts, including those providing for the establishment of minimum prices on patented gypsum board to be made and sold by the defendants. (2) That the license contracts, even if valid on their face, were not entered into as *bona fide* license agreements, reasonably designed to secure to USG the pecuniary reward for valid patent monopolies, but were executed by the defendants merely to give color of legality to a combination to restrain trade, by control of the prices and terms and conditions of sale of gypsum board, plaster, and miscellaneous gypsum products throughout the gypsum industry. (3) That the defendants' operations were carried beyond the proper limits of a patent monopoly and licensing thereunder by raising and fixing at arbitrary and non-competitive levels the price of gypsum board made and sold by the defendants, by improper standardization of gypsum board and its method of production, by raising, maintaining and stabilizing the level of prices of unpatented materials—plaster and miscellaneous gypsum products—by effectuating improper restriction upon distribution of gypsum board, plaster and miscellaneous gypsum products, and by fixing the prices at which manufacturing distributors resold gypsum board. (4) That the patents, or some of them, upon which such license agreements were purportedly based are invalid.

law * * *." And I think that in setting aside the trial court's findings of fact and in saying that "By the record *now presented*" violation of the Sherman Act is clear and in saying that, as the order of dismissal came at the end of the Government's presentation on defendants' motion to dismiss under Rule 41 (b), "the order is reversed and the case remanded *for further proceedings in conformity with this opinion*,"² the Supreme Court meant that the defendants' evidence should be heard and the case disposed of by the trial court upon the merits on the issues raised by the complaint and the answers and upon findings of fact and conclusions of law to be made anew after a weighing of all of the evidence, *i. e.*, that to be presented by the defendants as well as that which has been introduced by the Government. It is in my view not to be thought that the Supreme Court contemplated denial to the defendants of their day in court upon the issues raised by the pleadings. But that is the effect of the summary judgment; the defendants have made offers of proof but they are not to be permitted to present evidence. It is true that it is without dispute in the case that patent licenses with price fixing limitations were executed by the defendants, that these licenses were, in the large, adhered to by each defendant with knowledge of the adherence of others, and that they were industry wide; and these undisputed facts were adverted to by the Supreme Court in the course of its opinion ruling that a *prima facie* case of conspiracy to violate the Sherman Act had been made out by the Government. But I do not read the opinion of the Court as ruling that such a plurality of patent licenses is, without more, conclusive, rather
 12350 than merely *prima facie*, evidence of a violation of the Sherman Act. Had the Court regarded such a plurality of licenses, without more, as conclusive evidence of a violation of the Act it would I think have overruled *United States v. General Electric Company*, 272 U. S. 476 (1926). This it did not do either in its decision in the instant case or in *United States v. Line Material Co.*, 333 U. S. 287 (1948). In the latter case the Sherman Act violation found by the Supreme Court was laid by it to the cross-licensing of the Lemmon and Schultz patents, not to the admitted plurality of licenses with price fixing provisions entered into, as the Court said, as the result of arm's length

²*United States v. United States Gypsum Co.*, 333 U. S. 364, 401, 402 (1948); italics supplied.

bargaining although with knowledge on the part of each licensee of price provisions in the licenses of others.

I think therefore that the defendants should be permitted to present their offered proof on the issues of fact raised by their answers to the Government's complaint and that the court should then hear argument by counsel for the parties and should, after weighing the evidence of both the Government and the defendants, make findings of fact and conclusions of law anew and then render judgment accordingly thereto.

HAROLD M. STEPHENS, J.

November 7, 1949.

(File Endorsement Omitted)

12351 LICENSE AGREEMENTS

Omitted. Printed side page. 12293 *ante*.

12444 In the United States District Court
For the District of Columbia

(Title Omitted)

(File Endorsement Omitted)

Petition for Appeal—Filed January 6, 1950

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final judgment and decree of this Court entered on the 7th day of November, 1949, does hereby pray an appeal from said final judgment and decree to the Supreme Court of the United States. Pursuant to Rule 12 of the Rules of the Supreme Court, the plaintiff presents to this Court herewith a statement showing the basis of jurisdiction of the Supreme Court to entertain an appeal in this cause.

The particulars wherein the plaintiff considers the judgment erroneous are set forth in the Assignment of Errors and Prayer for Reversal accompanying this petition and to which reference is hereby made.

Plaintiff prays that its appeal may be allowed and that a citation be issued as provided by law, that a transcript of the record, proceedings, and documents upon which said final judgment and decree was based, duly authenticated, be sent to the Supreme Court

of the United States under the rules of said Court in such cases made and provided.

HERBERT A. BERGSON

Herbert A. Bergson
Assistant Attorney General

HOLMES BALDRIDGE

Holmes Baldridge
*Special Assistant to
the Attorney General*

EDWARD KNUFF

Edward Knuff
*Special Assistant to
the Attorney General*

This 6th day of Jan., 1950

12446 In the United States District Court
For the District of Columbia
(Title Omitted)

(File Endorsement Omitted)

Order Allowing Appeal—Filed January 6, 1950

In the above-entitled cause the United States of America, plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final judgment and decree of this Court in this cause entered on the 7th day of November, 1949, and having also made and filed its Assignment of Errors and Prayer for Reversal; and Statement of Jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided.

IT IS THEREFORE ORDERED AND ADJUDGED

That the appeal be and the same is hereby allowed as prayed for.

HAROLD M. STEPHENS

FINIS J. GARRETT

Finis J. Garrett

JOSEPH R. JACKSON

Joseph R. Jackson
*Designated as Judges of the United
States District Court for the District
of Columbia*

This 6th day of January, 1950

12447 In the United States District Court
For the District of Columbia

(Title Omitted)

(File Endorsement Omitted)

Citation—Filed January 6, 1950

To: United States Gypsum Company; National Gypsum Company; Certain-teed Products Corporation; The Celotex Corporation; Ebsary Gypsum Company, Inc.; Newark Plaster Company; Samuel M. Gloyd, Doing Business Under the Name of Texas Cement Plaster Company; Sewell L. Avery; Oliver M. Knode; Melvin H. Baker; Henry J. Hartley; Frederick G. Ebsary; and Frederick Tomkins.

You are hereby cited and admonished to be and appear at the Supreme Court of the United States in Washington within forty (40) days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the United States District Court for the District of Columbia, wherein the United States of America is appellant and you are appellees, to show cause why the judgment rendered as mentioned in said appeal should not be corrected.

HAROLD M. STEVENS

FINIS J. GARRETT

Finis J. Garrett

JOSEPH R. JACKSON,

Joseph R. Jackson

Designated as Judges of the United States District Court for the District of Columbia.

This 6th day of January, 1950.

12448 In the United States District Court
For the District of Columbia

(Title Omitted)

(File Endorsement Omitted)

*Assignment of Errors and Prayer for Reversal—Filed
January 6, 1950*

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal to the Supreme Court of the United States, hereby assigns error to the record and proceedings and the entry

of the final decree in the district court on November 7, 1949, in the above-entitled cause, and says that in the entry of the final decree the district court committed error to the prejudice of the plaintiff in the following particulars:

1. The court erred in failing to adjudicate that each individual defendant has violated Sections 1 and 2 of the Sherman Act, and is not subjecting each such defendant to the injunctive provisions of the judgment.

2. The court erred in failing to adjudicate that the defendants have conspired to restrain interstate commerce in gypsum products, in violation of Section 1 of the Sherman Act.

3. The court erred in limiting the prohibitions of Article V (3) of the judgment to restraints of trade in 12449 involving only gypsum board and in limiting these prohibitions to restraints of trade effected only by "license agreements."

4. The court erred in not enjoining any two or more defendants from agreeing, combining or conspiring with each other to eliminate price competition in the sale of gypsum board or gypsum products, to stabilize the prices thereof, to surpass any class of distributor thereof, or to suppress the production of unpatented gypsum products.

5. The court erred in limiting the requirement imposed upon United States Gypsum Company by Article VI, paragraph 1, of its judgment to 90 days after the effective date thereof, and in limiting such requirement to the nine patents referred to in the forms of agreement which the court approved and ordered filed herein (Decree, Article VIII).

6. The court erred in not providing that each license granted pursuant to the requirements of Article VI, paragraph 1, of the judgment shall be at a reasonable royalty, to be determined, in the event of disagreement, by the court or by a neutral third party.

7. The court erred in providing (Decree, Article VIII) that tender by United States Gypsum Company of a license containing the terms and conditions set forth in the applicable form of agreement which the court "approved" and "ordered filed herein" shall constitute compliance by United States Gypsum Company with the provisions of Article VI of the judgment.

8. The court erred in providing in the first of the license forms which it approved that the licensee shall make a monthly report to United States Gypsum Company of the

"quantity" of all gypsum board manufactured by it under the licensed patents, together with the "selling price" thereof, and that United States Gypsum Company 12450 may inspect the books and records of the licensee and make copies thereof (subject to the proviso that, upon the licensee's request, such examination shall be made by a certified public accountant);

9. The court erred in not entering judgment against the defendants for the full taxable costs of the proceeding.

10. The court erred in not including in its judgment provisions corresponding to those of Sections V, VI, IX and XI of the decree proposed by the plaintiff.

11. The court, if it concluded that controverted questions of fact prevented entry of judgment on the whole case or for all the relief requested, erred in not entering an order specifying the facts which it ascertained to be in dispute and directing the trial to proceed as to those facts.

Wherefore, plaintiff prays that the final decree of the district court may be reversed to the extent that it is inconsistent with the errors herein assigned by the plaintiff, and for such other and fit relief as the court may deem just and proper.

Herbert A. Bergson

HERBERT A. BERGSON

Assistant Attorney General

EDWARD KNUFF

Edward Knuff

*Special Assistant to
the Attorney General*

January 6, 1950

12493 In the United States District Court
 For the District of Columbia
 (Title Omitted)
 (File Endorsement Omitted)

Praecipe for Transcript of Record—Filed Jan. 28, 1950

To the Clerk of the United States District
Court for the District of Columbia:

Please prepare a transcript of the record in the above-entitled cause in the matter of the plaintiff's appeal herein and include in said transcript in the order given below the following papers:

PART I

Papers previously certified to the United States Supreme Court in response to plaintiff's praecipe filed with this Court on October 18, 1946.

1. The complaint; filed August 15, 1940.
2. Defendants' joint motion for bill of particulars; filed November 18, 1940.
3. Order on motion for bill of particulars; filed May 12, 1941.
4. Government's bill of particulars; filed May 15, 1941.
5. Amendment to complaint; filed June 5, 1941.
6. Answer of each defendant.
7. Expediting certificate; filed December 16, 1941.
8. Designation of judges appointed to the three-judge district court; filed September 17, 1942.
- 12494 9. Motion of each defendant for leave to file supplemental answer together with each proposed supplemental answer.
10. Government's motion for leave to amend prayer of complaint together with the proposed amendment; filed October 31, 1942.
11. Order granting the defendants leave to file supplemental answers; filed November 6, 1942.
12. Government's motion for leave to amend complaint by adding thereto a new paragraph numbered 46(a), together with the proposed amendment; filed February 22, 1943.
13. Order granting Government's motion to amend prayer of complaint; filed March 12, 1942.
14. Order granting Government's motion to amend complaint by adding a new paragraph numbered 46(a); filed March 12, 1943.
15. Defendants' joint motion to strike or, in the alternative, for partial judgment; filed September 28, 1943.
16. Revocation of designation of Judge Oscar E. Bland to perform duties of a District Judge; filed November 13, 1943.
17. Designation of Judge Joseph R. Jackson to perform duties of a District Judge; filed November 13, 1943.
18. Appointment of Judge Joseph R. Jackson as a member of the three-judge district court; filed November 13, 1943.
19. Opinion of the Court (majority and dissenting) on defendants' joint motion for partial judgment; filed November 15, 1943.

20. Order granting defendants' joint motion for partial judgment; filed November 15, 1943.
21. Supplemental answer of each defendant to paragraph 46(a) of the complaint; filed during the period November 15 to 29, 1943.
22. The following portions of the stenographic transcript of the testimony and trial proceedings: page 539 to 541, line 23, inclusive; pages 583 to 636, line 9, inclusive; pages 915, line 14, to 6865, inclusive.
23. All Government exhibits.
24. Government's requests for admissions directed to Certain-teed, National, and USG; filed March 8th and 9th, 1944.
25. Answers of Certain-teed, National, and USG to Government's requests for admissions; filed March 24th, 28th, and April 3rd, 1944.
26. Opinion; filed June 15, 1946.
27. Findings of fact and conclusions of law; filed August 5, 1946.
28. Final order and decree of the district court; filed August 5, 1946.
29. Orders correcting the opinion of June 15, 1946; filed September 4th and 25th, 1946.
- 12495 30. Assignment of errors and prayer for reversal; filed September 30, 1946.
31. The petition for appeal.
32. Statement of Jurisdiction.
33. Order allowing appeal.
34. Citation.
35. Statement required by paragraph 2, Rule 12 of the Rules of the Supreme Court of the United States.
36. Proof of service of appeal papers.
37. Opposing Statement as to Jurisdiction.
38. Request to transmit original documents.
39. Order to transmit original documents.
40. This praecipe.
41. Proof of service of this praecipe.
42. Clerk's certificate.

PART II

Papers previously certified to the United States Supreme Court in response to defendants' counter-praecipe filed with this Court on November 15, 1946.

1. Interrogatories addressed by plaintiff to defendants U.S.G., National Certain-teed, Celotex, Ebsary, Newark and Texas on or about January 23, 1942, and

order, dated April 5, 1943, requiring answers to certain of said interrogatories.

2. Affidavit of Edward Knuff, sworn to October 4, 1943, submitted in opposition to motion to strike or, in the alternative, for judgment in respect to par. 46(a) of Complaint.
 3. Reply affidavit of George S. Collins, sworn to October 15, 1943, submitted on motion to strike or, in the alternative, for judgment in respect to par. 46(a) of the Complaint.
 4. Stipulation and attached exhibit submitted to Court on November 15, 1943, in connection with motions to strike or, in the alternative, for judgment in respect to par. 46(a) of the Complaint.
 5. Certified copies of the following patents: No's. 1,914,345; 1,938,354; 2,017,022; 2,079,338; and 2,080,009 submitted on motion to strike or in the alternative, for judgment in respect of par. 46(a) of the Complaint.
- 12496 6. All pages of the stenographic transcript of proceedings from page 1 to page 7750, inclusive, not designated in paragraph 22 of plaintiff's praecipe, dated October 17, 1946.
7. All errata sheets showing corrections to all pages of stenographic transcript of proceedings from page 1 to page 7750, inclusive and all pages of stenographic transcript containing tables of contents and tables of exhibits.
 8. Stipulations correcting opinion of June 15, 1946, dated October 18, 1946 and October 29, 1946.
 9. Order dated October 28, 1946, extending defendants' time to file counter-praecipe.
 10. This counter-praecipe, together with proof of service thereof.

PART III

The following papers filed subsequent to the Mandate of the United States Supreme Court.

1. Order on mandate.
2. Plaintiff's motion for summary judgment.
3. Proffers of proof filed by United States Gypsum Company and Celotex Corporation.
4. Order enlarging time within which plaintiff may file proposed findings, conclusions and decree.
5. Order granting defendants time to file objections to proposed findings, etc.

6. Order granting defendants additional time to file objections to proposed findings etc.
7. United States Gypsum Company's proposed findings, conclusions and decree.
8. Draft of proposed license agreements submitted on behalf of United States Gypsum Company.
9. Stenographic transcript of trial proceedings from page 7751 to page 8300; both inclusive.
10. Decree.
11. Forms of license agreements approved and ordered filed.
12. Dissenting opinion of Stephens, J., on motion for summary judgment.
13. Plaintiff's assignment of errors and prayer for reversal.
14. Plaintiff's statement of jurisdiction.
15. Plaintiff's petition for appeal.
- 12497 16. Order allowing appeal.
17. Citation.
18. Statement required by paragraph 2, Rule 12 of the Rules of the Supreme Court.
19. Proof of service of appeal papers.
20. Affidavit of service of appeal papers.
21. This praecipe.
22. Proof of service of this praecipe.
23. Affidavit of service of this praecipe.
24. Request to certify and transmit original documents.
25. Order to certify and transmit original documents.
26. Clerk's certificate.

January 25, 1950.

EDWARD KNUFF

Edward Knuff

*Special Assistant to the Attorney General
Attorney for Plaintiff*

12498 In the United States District Court
For the District of Columbia

(Title Omitted)

(File Endorsement Omitted)

*Request to Certify and Transmit Original Documents—
Filed Jan. 28, 1950*

Comes now the United States of America, plaintiff-appellant herein, and requests the Court to enter an order

directing the clerk of this court to certify and transmit to the Clerk of the Supreme Court of the United States the original papers and documents specified in the praecipes to the clerk of this court as the transcript of the record on appeal.

EDWARD KNUFF

Edward Knuff
*Special Assistant to the
Attorney General*

This 24th day of January, 1950.

12499 In the United States District Court
For the District of Columbia

(Title Omitted)

(File Endorsement Omitted)

*Order to Certify and Transmit Original Documents—
Filed Jan. 28, 1950*

In the above-entitled cause the United States of America, plaintiff-appellant herein, has applied for an order directing the clerk of this court to certify and transmit to the Clerk of the Supreme Court of the United States the original papers and documents specified in the praecipes to the clerk of this court as the transcript of the record on appeal.

IT IS THEREFORE ORDERED

That the request be and the same is hereby granted, and the clerk of this court is directed to certify and transmit to the Supreme Court of the United States the original papers and documents specified in the praecipes.

FINIS J. GARRETT

*Designated as a Judge of the
United States District Court
for the District of Columbia*

This 24th day of January, 1950.

12500 In the United States District Court
For the District of Columbia

(Title Omitted)

(File Endorsement Omitted)

Proof of Service—Filed Jan. 28, 1950

Service of plaintiff's Praecipe for Transcript of Record,
Request to Certify and Transmit Original Documents and

Order to Certify and Transmit Original Documents, is accepted and copies received this 25th day of January, 1950.

HUGH LYNCH, JR. per LHK
Attorney for the Defendants,
United States Gypsum Company,
Sewell L. Avery, and Oliver
M. Knode.

NICHOLAS J. CHASE (R W M Jr.)
Attorney for the Defendants,
National Gypsum Company and
Melvin H. Baker.

CHARLTON OGBURN per mh
Attorney for the Defendant,
Certain-teed Products
Corporation.

RALPH P. WANLASS
Attorney for the Defendant,
The Celotex Corporation.

JAMES O'DONNELL, JR., E W S.
Attorney for the Defendants,
Newark Plaster Company and
Frederick Tomkins.

GEO. E. H. GODNER
Attorney for the Defendant,
Samuel M. Cloyd, Doing Business
Under the Name of Texas Cement
Plaster Company.

12501 In the United States District Court
 For the District of Columbia
 (Title Omitted)
 (File Endorsement Omitted)

Affidavit of Service—Filed Jan. 28, 1950

Edward Knuff, being duly sworn according to law, deposes and says:

That on January 25, 1950 there was forwarded by first-class mail to Joseph S. Rippey, counsel for Ebsary Gypsum Company and Frederick G. Ebsary, and to Harold F. McGuire, counsel for Henry J. Hartley, copies of Praecipe for Transcript of Record, Request to Certify and Transmit

Original Documents and Order to Certify and Transmit Original Documents, all of which pertained to the appeal taken by the plaintiff in the above entitled cause.

EDWARD KNUFF

Edward Knuff

*Special Assistant to the Attorney General
Attorney for Plaintiff*

Sworn and subscribed to before me this twenty-fifth day of January 1950.

(Seal)

HARRY J. PIZZA

My commission expires May 14, 1954.

12502 In the United States District Court
For the District of Columbia

(Title Omitted)

(File Endorsement Omitted)

*Counter-Praeipce of Defendants United States Gypsum
Company, Sewell L. Avery and Oliver M. Knode—Filed
Feb. 3, 1950*

To: The Clerk of the United States District Court for the
District of Columbia

In preparing the transcript of record in the above-entitled cause on the appeal of plaintiff, taken January 6, 1950, please include in said transcript the following:

1. Government's Suggested Corrections to Transcript, filed November 2, 1949.

2. United States Gypsum Company's Suggested Corrections to Transcript, filed December 20, 1949.

3. Statement by Defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode of Grounds Making Against the Jurisdiction of the Supreme Court Asserted by Plaintiff, filed January 20, 1950.

12503 4. The following portions of the "Memorandum in Opposition to Plaintiff's Proposed Decree, Findings and Conclusions" filed March 4, 1949, on behalf of defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode:

(a) The paragraph commencing at the bottom of page 7 thereof with the words "Without waiving our objection", etc., and ending on the second line of page 8 thereof; and

(b) The first two full paragraphs on page 8 thereof, the first of said paragraphs commencing with the words "Plaintiff's motion for summary judgment", etc., and the second of said paragraphs commencing with the words "If the Court concludes", etc.

5. This counter-praeceipe, together with proof of service thereof.

February 3, 1950.

ALBERT R. CONNELLY
CRANSTEN SPRAY
HUGH LYNCH, JR.
*Attorneys for Defendants United
States Gypsum Company, Sewell L.
Avery and Oliver M. Knode*

12536 In the Supreme Court of the United States
(Title Omitted)

Motion to Supplement Record—Filed April 19, 1950

Now comes United States of America, plaintiff-appellant in the above-entitled cause, and moves the Court that the record on appeal in the above-entitled cause be supplemented by the addition of plaintiff's proposed findings, conclusions and decree, heretofore filed in the United States District Court for the District of Columbia, a certified copy of which is attached hereto. A stipulation by the parties agreeing to said supplementation is now being prepared and will be filed in this Court as soon as the same has been executed.

PHILIP B. PERLMAN
Solicitor General

April 19, 1950.

12537 (File Endorsement Omitted)

12538 { United States District Court
For the District of Columbia

UNITED STATES OF AMERICA, PLAINTIFF
vs.

UNITED STATES GYPSUM Co., et al., DEFENDANTS.

No. 8017 Civil Action.

I, HARRY M. HULL, Clerk of The United States District Court for the District of Columbia, do hereby certify the

annexed to be a true and correct copy of the original Plaintiff's Proposed Findings of Fact and Conclusions of Law, filed April 19, 1950, as it (they) appear . . . of record in the Clerk's Office of said Court in the above-entitled cause.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, this 19th day of April, 1950.

(Seal)

HARRY M. HULL
Clerk

By H. N. GRAVE
Deputy Clerk

12539 In the United States District Court
For the District of Columbia

UNITED STATES OF AMERICA, PLAINTIFF
v.

UNITED STATES GYPSUM COMPANY, *et al.*, DEFENDANTS

Civil Action No. 8017

*Plaintiff's Proposed Findings of Fact and Conclusions
of Law*

This cause having duly come on to be heard on motion of plaintiff for a summary judgment, filed at the request of the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, as amended, or in the alternative, for such further proceedings as the Court should order, based upon the existing state of the record; and the Court having considered the pleadings in the action and all proceedings heretofore had herein, including all exhibits and testimony of witnesses, the admissions by counsel for the defendants, the proffer of proof submitted pursuant to the Court's request of June 8, 1948, by all defendants, except National and Ebsary which defendants did not submit any proffer of proof; having read and considered the briefs submitted on behalf of the parties hereto; having heard oral argument; having found that there is no genuine issue as to any material fact except as to the proper inferences to

12540 be drawn from the exhibits and the uncontradicted testimony of witnesses who testified at the trial of this cause, and also except as to the scope and extent of the relief to be granted; the Court, pursuant to Rule 52 of the Federal Rules of Civil Procedure, as well as upon the mandate of the Supreme Court of the United States, dated

the ninth day of April, 1948, makes the following special findings of fact and reaches the following conclusions of law.

FINDINGS OF FACT

I. THE DEFENDANTS

1. This is an action in equity instituted by the United States, hereinafter referred to as the Government, to restrain the defendants from violating Sections 1, 2 and 3 of the Sherman Act. Injunctive relief is sought under Section 4.

2. The corporate defendants are: United States Gypsum Company (hereinafter referred to as USG), National Gypsum Company (National), Certain-teed Products Corporation (Certain-teed), The Celotex Corporation (Celotex), Ebsary Gypsum Company, Inc. (Ebsary), and Newark Plaster Company (Newark). The individual defendants are Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company (Texas), Sewell L. Avery, Oliver M. Knode, Melvin H. Baker, Henry J. Hartley, Frederick G. Ebsary, and Frederick Tomkins. Avery was president of USG from 1905 to 1936, and since then has been chairman of the Board of Directors. Knode is president* of USG. Baker is president of National. Hartley is 12541 president* of Certain-teed. Ebsary is president of Ebsary. Tomkins is president of Newark.

3. The defendant companies are engaged in the mining and production of gypsum and in the manufacture of gypsum products, principally gypsum board* and gypsum plaster. Each sells gypsum products in interstate commerce to distributors and consumers within the so-called Eastern area which includes the states east of the Rocky Mountains. The defendant companies combined manufacture 100% of the gypsum board and a substantial percentage of the plaster sold in the Eastern area.

4. Defendant USG was incorporated in 1901 to effect a merger of 35 producers, processors and distributors of gypsum products. During the last twenty years it has acquired the gypsum plants of eight additional producers including the Niagara Gypsum Company (Niagara). USG now operates 16 plants in the Eastern area, at 13 of which

* As of the time when the suit was filed.

* "Gypsum board" or "board" is used to refer to gypsum plaster-board, gypsum lath, and gypsum wallboard.

board is produced. Since its organization in 1901 it has been the largest producer of gypsum board and plaster in the United States. In 1939 it produced and sold approximately 55% of all the gypsum board and a substantial amount of all plaster sold in the Eastern area. In that year its sales in the Eastern area of gypsum board amounted to approximately \$10,600,000.

5. Defendant National was incorporated in 1925 and commenced production of gypsum board and plaster in 1926. In 1935 it acquired Universal Gypsum and 12542 Lime Company (Universal); in 1936 the Atlantic Gypsum Products Corporation (Atlantic); and in 1938 the Oakfield Gypsum Products Corporation. National, now the second largest producer of gypsum board in the United States, operates ten plants in the Eastern area, eight of which produce gypsum board. In 1939 it produced approximately 23% of all gypsum board and 20% of all plaster manufactured and sold in the Eastern area. In that year its sales in the Eastern area of gypsum board amounted to approximately \$4,500,000.

6. Defendant Certain-teed entered the gypsum industry in 1923 by acquiring the six gypsum plants of the Acme Cement Plaster Company, but did not commence manufacturing gypsum board until 1926. In 1928 it acquired the Beaver Products Company, Inc., and the Beaver Board Company (both sometimes referred to as Beaver), then the second largest producer of gypsum board. Beaver had entered the gypsum industry in 1920 by the purchase of the American Cement Plaster Company and Bestwall Manufacturing Company (Bestwall). Certain-teed now operates five plants, four of which produce gypsum board, and is the third largest producer of gypsum products in the United States. In 1939 it produced approximately 11% of all gypsum board, and 10% of all plaster manufactured and sold in the Eastern area. In that year sales of Certain-teed in the Eastern area of gypsum board amounted to \$2,100,000.

7. Defendant Celotex, the largest producer of fiber insulating board in the United States, entered the gypsum industry by acquiring the American Gypsum Company (American) in 1939. In 1939 sales by Celotex in the Eastern area of gypsum board amounted to approximately \$585,000.

12543 8. Defendant Ebsary, a single plant operator, has been engaged in the manufacture of plaster since 1918, and gypsum board since 1928. Its sales of gypsum

board in the Eastern area in 1939 amounted to approximately \$670,000.

9. Defendant Newark, a single plant operator, has been engaged in the production of plaster since 1922 and the manufacture of gypsum board since 1937 when it acquired the Kelley Plasterboard Company, Inc. (Kelley), which had been engaged in the production of board since before 1918. Newark's sales in the Eastern area of gypsum board in 1939 amounted to approximately \$750,000.

10. Defendant Samuel M. Gloyd, a single plant operator, is the sole owner of an unincorporated business trading under the name of Texas Cement Plaster Company (Texas). It has been manufacturing plaster since about 1902 and gypsum board since 1924. Its sales in the Eastern area of gypsum board in 1939 amounted to approximately \$230,000.

II. THE GYPSUM INDUSTRY

11. Gypsum is a rocklike mineral composed of calcium sulphate in combination with water and is found in deposits in numerous states of the United States and in Canada. After it is mined it is crushed and subjected to a process known as calcination to evaporate part of its water content. The resulting product known as calcined gypsum or stucco has the characteristics of readily recombining with water to form a hard, rigid mass. Calcined gypsum is the primary constituent of various important products used in the construction industry. Its principal products are gypsum board and plaster. In addition, there are several less important products such as gypsum block and tile. In 1939 the sales value of all products of calcined gypsum used in the building industry in the United States amounted to \$42,000,000, \$23,000,000 of which was accounted for by gypsum board and \$17,000,000 by plaster.

12. Until about the year 1900 lime was the principal ingredient of all wall plaster. About 1900, however, gypsum became commercially important as an ingredient of plaster in place of lime. Since that time, gypsum has gradually displaced lime in plaster, and over 90% of all plaster now used in building construction in the United States is made with gypsum.

13. The basic patents on gypsum board have long since expired. Commercial production of gypsum board commenced about 1905. For many years thereafter, by far the greatest amount of gypsum board produced was board designed to be used as a base for plaster in wall and ceil-

ing structures and known as plasterboard. About 1925, a board smaller than plasterboard, known as gypsum lath, was introduced on the market as a plaster support. By reason of the smaller and, therefore, more convenient size of gypsum lath, it has displaced plasterboard in new construction, and plasterboard is now used solely for repair work. Today gypsum lath is usually $\frac{3}{8}$ or $\frac{1}{2}$ inch in thickness, 16 inches wide, and it is either 32, 36, or 48 inches long. The sales value of gypsum lath and plasterboard manufactured by the defendant companies and sold in the United States in 1939 was about \$13,000,000.

14. Several years after the first commercial manufacture of plasterboard, a gypsum board, known as wallboard and designed to be used as a finished panel in place of 12545 plaster and lath, was introduced on the market.

Gypsum wallboard is now one of the most important of various boards on the market which are used as substitutes for plaster and lath. Today wallboard is either $\frac{1}{4}$, $\frac{3}{8}$, or $\frac{1}{2}$ inch in thickness, 32, 36, or 48 inches wide, and comes in various lengths from 4 to 12 feet long. The sales value of gypsum wallboard manufactured by the defendants and sold in the United States in 1939 was about \$8,500,000.

15. All gypsum board consists of a flat, thin core of hardened calcined gypsum covered on both surfaces with heavy paper, known as liners. Since gypsum lath and plasterboard are intended to support plaster, the paper liners with which the surfaces of the gypsum core are covered are coarse. Because gypsum wallboard is a substitute for both plaster and lath, and is therefore not covered with plaster, one of its liners consists of a good grade of heavy, smooth paper. In the early period of its manufacture, gypsum board was crudely made by pouring buckets of calcined gypsum mixed with water in thin layers between two pieces of rough felt paper, smoothing the product with rollers, hardening it on racks and trimming the pieces to size. For many years—at least since 1920—board and lath have been made by depositing the wet gypsum or gypsum slurry on a continuous sheet of paper that unrolls and moves along on a belt or conveyor some several hundred feet in length. After the slurry is placed on the lower sheet of paper it is mechanically spread substantially even over it; the top sheet of paper then unrolls and is pressed down on the slurry as it passes under rollers. At the end of the conveyor the board is cut to size and placed in dryers from which it comes out as a finished product.

12546 in about thirty minutes. Perforated lath is made by punching holes in lath made in this manner. Metallizer board has a paper-thin thickness of metallic foil attached to one surface of ordinary board or lath.

III. THE CONSPIRACY

A. During The Years 1925-1926

16. Prior to 1912 the edges of the core of all gypsum board were exposed. About 1912 USG commenced the manufacture of a gypsum board with the side edges bound and sealed by folding the lower paper liner over the edges of the core. The end edges of the board continued to be exposed as before. This improvement was covered by United States letters patent, number 1,034,746, issued August 6, 1912, upon the application of Clarence W. Utzman, and assigned by him to USG. The board embodying the edges described in the Utzman patent was known as a closed-edge board as distinguished from board with an unprotected edge which was known as open-edge board. The closed-edge board represented an improvement over the open-edge board then on the market since it reduced breakage in shipment and crumbling of the core at the side edges when being nailed into place.

17. Prior to 1917 the Bestwall Manufacturing Company (Bestwall) commenced the manufacture of a closed-edge board. In July of that year USG filed suit against Bestwall and in July, 1919 obtained a judgment holding the Utzman patent valid and infringed. This judgment was affirmed by the Circuit Court of Appeals for the Seventh Circuit on January 4, 1921. During the course of

12547 this litigation Bestwall had been acquired by Beaver, which then became the second largest manufacturer of gypsum board in the United States, and both were manufacturing a board with semi-closed edges. By a supplemental bill USG sued both of these companies for infringement and again prevailed. Beaver appealed to the Circuit Court of Appeals for the Seventh Circuit.

18. In addition to the suits mentioned in Finding 17, USG also instituted suits for infringements against American, Universal, National, and gave notice of infringement to Niagara. Both Texas and Atlantic were also notified that if they produced closed-edge board suits for infringement would be instituted.

19. Prior to the last mentioned judgment for infringement, Beaver, by its president, A. S. Blagden, entered into

negotiations for settlement of said infringement litigation with S. L. Avery, president of USG, which negotiations continued until a final settlement was reached on July 29, 1926. At a meeting in December 1925 Avery specified as his terms of settlement the payment of damages for infringement, acknowledgement of the validity of USG's patents, payment of royalties, and the right in USG to fix the prices of patented board to be made and sold by Beaver. The terms fixed by USG as a basis for the settlement and the license agreement with Beaver were the same terms demanded of each subsequent licensee of USG. USG did not deviate from those terms in any of its license agreements.

20. Following this meeting between Blagden and Avery, Blagden, on December 12, 1925, sent Avery a memorandum in which he analyzed in detail the consequences 12547a that would follow from five possible decisions of the

Circuit Court of Appeals if the judgment adjudging Beaver an infringer were appealed. Blagden pointed out that whether the court upheld or denied USG's claim, USG would lose, perhaps irrevocably, its present opportunity to organize the industry and stabilize prices. The memo pointed out further that if the suit were settled, the result would be more favorable to USG than any possible decision by the Court of Appeals; that Beaver would accept a license and would agree to use its best endeavors to induce other manufacturers to accept similar licenses; that if Beaver were successful in persuading other manufacturers to execute licenses, USG could maintain a lawful price control and avoid the necessity of a reduction by USG of current prices to meet competition. Under such circumstances, Blagden pointed out, USG would be able to take a dominating position in the industry with an opportunity to control or at least to participate in the control of prices through legitimate means of patent licenses.

21. In May 1926 Blagden conferred with Griswold, general manager of American Gypsum Co., with regard to entering into a price-fixing patent licensing arrangement with USG under the Utzman closed-edge board patent. Both Blagden and Griswold understood that an industry-wide price-fixing licensing arrangement with USG would stabilize prices in the gypsum industry. Following this conference, a meeting of board manufacturers was held in Chicago on May 19, 1926, which was attended by Avery, Blagden, Griswold and representatives of every board manufacturer in the Eastern area, except Texas and National. At this

conference, one of the subjects discussed was the licensing by USG of those present under various patents 12548 owned by USG, USG to have the right under these agreements to fix prices on board manufactured by the licensees under the Utzman closed-edge board patent. No definite decision was reached at this conference with respect to an industry wide licensing arrangement.

22. In the succeeding months of June and July 1926, Blagden had further conferences with representatives of USG. During these conferences Blagden offered to transfer to USG all patents that Beaver had in any way relating to the manufacture of gypsum board. The Beaver and USG patents on the closed-edge type of board were practically all the patents there were on this type of edge. Blagden pointed out to Avery that by combining the 30 or more Beaver patents and applications with those of USG, USG would be in a better position to come to an agreement with the other board manufacturers. USG accepted the offer of Blagden and the patents were in fact transferred to USG on July 29, 1926. On the same day Beaver and USG settled their litigation and USG granted Beaver a license. Following the signing of this license agreement, Blagden talked to a number of representatives of other board manufacturers and urged them to accept similar licenses from USG.

23. During this same period Griswold was also active in promoting a scheme of industry-wide price-fixing patent license agreements with USG as the licensor. He contacted representatives of all board manufacturers and urged them to become licensees of USG. Late in October 1926 Griswold arranged for a committee of American Gypsum Company officials to meet with other manufacturers of 12549 board who had not signed the license agreement, with the object in view of getting united action on the matter. This meeting, however, did not materialize. Griswold kept Avery fully advised concerning all of these efforts.

24. About six weeks after Beaver signed the license agreement mentioned in Finding 22, Universal and USG also settled their patent infringement suit, and on September 17, 1926, Universal became a licensee. Both of the above license agreements were substantially identical and among other things provided that:

(a) USG licensed Beaver and Universal to use inventions covered by the Utzman patent, 29 other patents, and 38 applications for patents, in manu-

facturing gypsum board, until the expiration of the Utzman machine patent on February 10, 1937. These patents and applications included those transferred to USG by Beaver.

(b) USG reserved the right to determine and fix, during the life of the Utzman closed-edge patent, or until August 6, 1929, the price at which the licensees sold closed-edge board.

(c) The licensees agreed to pay specified royalties on all board manufactured by them, whether patented or unpatented, until February 10, 1937.

(d) The licensees agreed to admit that all board having a protected edge fell within the scope of the Utzman patent, during the life of that patent, and that, after its expiration, all board having a protected edge was made under the machine patent or under other patents covered by the license agreements.

(e) The licensees acknowledged, and agreed not to contest, the validity of all patents covered in the license agreements and of all patents subsequently issued on applications covered in the agreements.

25. Although the combined efforts of Griswold and Blagden to induce the other manufacturers of board to become licensees of USG were unsuccessful, the refusal of the manufacturers was not due to the fact that they objected to USG's fixing their prices on board. The difficulties encountered arose from: (a) the length of time the license agreements were to run, and (b) the number of patents included in the agreement, the validity of which the manufacturers would be forced to acknowledge. The board manufacturers made a counter proposal that the agreements should run for about three years or until August 6, 1929, when the closed-edge patent expired, and that only the Utzman closed-edge patent would be the subject of any license. The manufacturers did not in their counter proposal specify that price control should be eliminated. Avery rejected this proposal.

B. During the Year 1927

26. Throughout the year 1927 both Blagden and Griswold continued the campaign to induce non-licensee board manufacturers to become licensees of USG. Board manufacturers were urged by them to enter into a price-fixing licensing arrangement with USG. From time to time, in an effort to induce these manufacturers to take out a license with

USG, Griswold advised manufacturers of the attitude that other manufacturers took with respect to the licensing arrangement. Avery, in turn, was also kept fully informed of the progress that was being made as well as the attitude of the board manufacturers towards the licensing scheme.

27. Despite the efforts of Blagden and Griswold, only two additional patent license agreements were entered into during the year 1927. Atlantic on March 5, 1927, 12551 and Texas on April 18, 1927, entered into separate price-fixing license agreements with USG, which were substantially identical with the aforesaid Beaver and Universal agreements.

28. Late in 1926 Certain-teed commenced the manufacture of an open-edge board. Throughout 1927, to overcome consumer preference for the closed-edge board, Certain-teed sold its open-edge board at a differential below the price of closed-edge board. The introduction of the open-edge board on the market by Certain-teed at reduced prices constituted a competitive threat to the rest of the board industry. American, National, and Niagara, which were manufacturing board with a semi-protected edge, met the competition of the open-edge board by marketing a second grade board which these companies sold at about the same price as that of open-edge board. USG, in order to meet this competition, reduced the price of its No. 1 closed-edge board slightly. At the same time it also placed on the market a sub-grade closed-edge board which it sold at reduced prices. During this period, because of price competition, board prices and plaster prices became increasingly demoralized throughout the industry.

C. During the Year 1928

29. In January 1928 Certain-teed purchased the assets of Beaver. Certain-teed had previously been making an open-edge board and selling it at lower prices than the closed-edge board manufactured by USG and its licensees. Certain-teed refused to accept the license agreement of Beaver and USG filed suit to compel Certain-teed to accept the license agreement. Certain-teed posted a million dollar bond and commenced to make open-edge board at 12552 all the Beaver plants. George M. Brown, president of Certain-teed, and Avery had several conferences at which they attempted to compose their differences, but without success. During this period Brown felt confident that he could make open-edge board and sell it in competition with USG. Brown also felt that the suit instituted

by USG was not filed in the interest of royalties but for the sole purpose of trade domination and monopoly and price control. Brown understood that USG's determination to gather in a monopoly, if possible, led them to risk everything for such domination because of the big rewards possible, if they were successful. On March 14, 1928, Certain-teed filed an answer to the suit couched in those terms.

30. Within a few weeks after Certain-teed filed the answer to the suit of USG, Griswold and Brown had a conference in New York with reference to Certain-teed becoming a licensee of USG. At this conference Brown advised Griswold that Certain-teed would be willing to enter into a license agreement with USG, providing all of the manufacturers, including Ebsary, would do likewise and make it one hundred per cent. Either shortly before or shortly after the conference between Griswold and Brown, Avery and Griswold conferred in Chicago with reference to Certain-teed becoming a licensee of USG. Avery advised Griswold that USG would be willing to drop the suit against Certain-teed providing Certain-teed would carry out the Beaver Products Company's contract. During this period, Avery and Griswold both understood that stabilization of the prices on board would also have the effect of stabilizing all prices in the gypsum industry.

31. On April 12, 1928, Blagden advised Griswold 12553 that recently he had had several conferences with Avery on the subject of the license arrangement and that he had also conferred with Certain-teed officials on the same subject. Blagden advised Griswold that if The American Gypsum Company, The National Gypsum Company, the Ebsary Gypsum Company and the Niagara Gypsum Company would all get together and agree, he felt certain that Brown would join them. Blagden inquired of Griswold what position American would take and was told by Griswold that an immediate answer could not be given.

32. Eugene Holland became president of Universal in 1928. Notwithstanding Universal had been a licensee of USG since 1926, Holland became very active in 1928 in trying to persuade other board manufacturers to become licensees of USG. Holland, in an effort to promote an industry-wide price-fixing license agreement with USG, contacted various board manufacturers. Holland understood

that an industry-wide licensing arrangement on board would stabilize prices in the gypsum industry.

33. On October 11, 1928, a meeting was held attended by Holland and representatives of other companies which had not yet signed a license agreement with USG. The non-licensee companies in attendance were American, Ebsary, Niagara, National, and Certain-teed. The subject discussed at this meeting was a price-fixing patent license agreement on board with USG. It was made clear to those in attendance that Certain-teed would not be willing to take out a license agreement with USG on board unless it carried with it a general cleaning up of unsatisfactory conditions on all gypsum products. The meeting adjourned without definite action on the licensing arrangement.

12554 34. Shortly after the meeting of October 11, 1928, representatives of National had further conferences with representatives of USG concerning a license agreement, as a result of which the board of directors of National, on November 27, 1928, adopted a resolution authorizing the officials of the company to enter into a license agreement.

35. The demoralization of the price structure occasioned by active competition in the gypsum industry, and which was under way in 1927, continued in an even more aggravated manner throughout 1928.

D. During the Year 1929

36. Early in 1929 Holland renewed his activities for an industry-wide license arrangement. He kept trying to talk the non-licensee board manufacturers into taking out a license. During this period Holland understood that American favored an industry-wide license arrangement but that American hoped that by delaying the execution of any license with USG they would be able to secure more favorable terms. Holland was opposed to any delay. In an effort to bring pressure to bear on American to enter into a license arrangement, Holland wrote to Mr. Haggerty, president of National, and suggested that an effort should be made to hold another meeting of those interested in the board situation. He further stated that American should consider the others involved to the extent of at least letting them know what American proposed to do so that National and others could be governed accordingly. Holland understood and so advised Haggerty, that American's delay in executing a license agreement would cause a
12555 demoralization of prices during most of 1929, unless prompt action was taken by non-licensee board manufacturers to enter into license agreements with USG.

37. On January 9, 1929, Haggerty answered Holland's letter and advised him that on January 5, 1929, he had met with Mr. Kling of American, and took the occasion to question him very pointedly on his attitude towards the license agreement; that Kling told him very definitely that American had decided not to become a licensee. Both Haggerty and Kling expressed great concern over the possibility of an effective plan of price control on board in view of the imminent expiration of the Utzman patent on August 6, 1929, and also how such a plan for price control could be worked out after the Utzman patent expired that would continue throughout the life of the license agreements, viz., to 1937. This concern of Haggerty and Kling was communicated on January 9, 1929, by Haggerty to Holland. Likewise, Haggerty expressed to Holland his concern over whether or not the other four board makers, who were outside the license agreement, would be willing to enter into a license agreement with USG without the American Gypsum Company. Haggerty felt that the chief value in a meeting, as suggested by Holland, would be to discuss that point.

38. On January 12, 1929, Holland advised Haggerty that if this plan for price control on board could not be worked out on the Utzman patent, there were other patents available; the fact that the Utzman patent expired in August 1929 was not, according to Holland, a practical reason for continuing the conflict. Holland recalled to Haggerty the fact that Mr. Kling stated several times that American would be materially influenced by the attitude of the other men involved. He suggested that an effort be made to hold Kling to this idea. Holland suggested further that, if after conferring with Mr. Brown and Mr. Reeb it was thought advisable that this should be done, he would be willing to make an effort to bring this about. Holland also stated that he proposed to discuss the matter further with Mr. Brown and promised Haggerty to communicate later with him as to Brown's reactions.

39. During the first part of 1929, Holland, in addition to contacting non-licensee board manufacturers and urging them to become licensees of USG, also conferred with Avery on the subject of industry-wide license agreements.

40. Following the exchange of letters between Holland and Haggerty referred to in Findings 36 to 38 inclusive, the board of directors of National held a meeting on May 14, 1929, for the purpose of discussing the license agree-

ment submitted by USG to all the manufacturers of gypsum products in the United States east of the Rocky Mountains. At this meeting Baker of National outlined the principal provisions in the license contract and stated to the board that he had been definitely informed that all other manufacturers of gypsum products east of the Rocky Mountains, except the American Gypsum Company, had agreed to sign the license contract in substantially the form as submitted to National. Baker also stated that a final meeting was to be held in Chicago, Ill., within a week for final disposition of the license contract, and that it was therefore imperative that immediate action be taken by the board. The board of directors by resolution authorized their officers to execute the proposed contract.

12557 41. On May 16, 1929, National signed a license agreement with USG. On May 17, 1929, National sent a telegram to Avery advising him that they had signed the license agreement; that they were working with Ebsary with the hope of everybody being set by the following Saturday so that Avery could call a meeting of all board makers on the following Monday, if he so desired. On the same day Avery wired Gloyd, of Texas Cement Plaster Co., that there had been much discussion of infringement settlement and license on board, and added that he thought it safe to say that the outlook was favorable. On May 18, 1929, Avery dispatched identical telegrams to USG's licensees, and to Certain-teed and Ebsary. In these telegrams Avery advised them that American had sent in a contract with material changes in it; that American could not attend the meeting unless these changes were accepted; that the changes could not be accepted; and that the proposed meetings would be futile unless the other companies desired to go ahead with the licenses without American. On May 20, 1929, Avery wrote Gloyd stating that although American was unwilling to accept a license, officers of Certain-teed, Niagara, Ebsary, and National had expressed themselves favorable to the licensing arrangement, and that it was not improbable that the matter would be closed at the meeting of May 21, 1929 or soon thereafter.

42. A prearranged meeting was held at the Palmer House, Chicago, during the period May 21 through 23, 1929. At this meeting there were present one or more representatives of every non-licensee board manufacturer in the Eastern

area, except American and Kelley, and one or more
 12558 representatives of all existing licensee board manufacturers except Texas. However, both American and Texas had knowledge that this meeting was to be held. On the first day of the meeting when all the manufacturers were assembled in one room, Avery made a short statement and welcomed the non-licensee manufacturers as prospective licensees. He also stated that if all companies would take out a license from USG, that would correct the demoralized conditions in which the board industry now found itself. After the statement by Avery, each non-licensee manufacturer, except Ebsary, then met separately with representatives of USG and proceeded to work out individually the details of their settlement of the USG infringement claims and the claim against Certain-teed. Niagara signed the license agreement on May 21, 1929, and Certain-teed and Ebsary signed on the following day. These agreements were substantially identical with the Beaver and Universal agreements referred to in Finding 24.* As of May 22, 1929, every board manufacturer in the Eastern area, with the possible exception of Kelley, knew that each license agreement was not an isolated and separate transaction, but was part of a larger price-fixing patent license arrangement which embraced all board manufacturers in that area except American and Kelley. Less than a month later, American signified its willingness to become a licensee of USG.

43. On the afternoon of May 22, 1929, all the licensees, both new and old, were again assembled in one room
 12559 at the Palmer House and at this time USG passed out to each licensee a price bulletin on board. Those present anticipated and expected that USG would fix a price on board which would be higher than the prices previously prevailing. Prices were raised by this bulletin. The price bulletin passed out at this time introduced a number of new practices into the industry. The principal innovation was the establishment of a basing-point price system of distribution on board, limited only to seven shipping points. Board prices to dealers were to be calculated on the basis of a fixed mill-base price plus freight from the nearest of these seven points to the point of destination. Since board made by different manufacturers varied in weight,

* All the license agreements entered into by USG and its various licensees under the Utzman closed-edge patent, Patent No. 1,034,746 (including the licenses to Beaver, Universal, Atlantic and Texas), will hereinafter be referred to as the May 1929 agreements.

in order to assure that the prices to dealers would be uniform, it was necessary also to prescribe a uniform billing weight on which to calculate the freight charges, which, in this instance, was 1850 pounds per thousand square feet of $\frac{3}{8}$ inch board. In addition, special provisions were made for truck deliveries. Also, all wallboard seconds were to be plainly marked with visible red stamp as "seconds." Such elaborate regulations, when considered in the face of the fact that the Utzman patent was to expire in about eleven weeks, clearly indicates that there was a general understanding that price control was to continue under some other patent.

44. On May 23, 1929, the same manufacturers were again assembled in the Palmer House for their third joint meeting. Avery told those assembled that USG had secured the American rights for the Bayer application for a patent on a process to make a so-called "bubble board." Roos, of USG, also had an application pending for a patent for a similar process. Avery explained that the inventions related to a lightweight board made by the introduction of soap foam in the gypsum slurry and proposed that the industry take out price-fixing licenses under the Roos and Bayer applications. Avery subsequently mailed proposed license agreements under the "bubble board" applications to each of its licensees. Upon the receipt of this proposed license agreement, George M. Brown, on June 4, 1929, prepared a memorandum for his own files in which he set forth his understanding of the purpose of the proposed agreement. Brown understood that USG should be just as anxious to have Certain-teed use this as Certain-teed should be to get it if there were to be the benefits that USG anticipated; i. e., stabilization of the whole industry by making a uniform product and getting away from the fierce warfare between different products.

45. On June 6, 1929, the licensees met again in Chicago and discussed the question of accepting a license under the "bubble board" applications. At this meeting the licensees discussed how price control on board could be extended for a seventeen year period and concluded that it could be done if a satisfactory working arrangement could be made with the "bubble patent." USG advised those in attendance that American expected to become a licensee of USG. USG urged those in attendance to get after their lawyers and

have them look over the proposed license agreements and then send to USG their comments concerning the contracts. Those in attendance expected that patents would be issued on the pending applications before the end of 1929.

46. Sometime prior to July 3, 1929, Certain-teed decided to become a licensee of USG under the bubble invention. National also welcomed the opportunity to become a licensee. However, National did not want to contract for the payment of any additional royalty for the bubble process unless all manufacturers in the industry were going to take a new license from USG. Therefore, National delayed executing the new license until it was informed by USG that most of the other manufacturers had indicated a disposition to take the new license. On July 23, 1929, the board of directors of National met, and the president advised the board that USG had been working on a plan to stabilize the gypsum industry under the "bubble board" invention. He stated further that the proposed license agreements submitted to each of the board manufacturers contained price-fixing clauses; that under these agreements the prices on board would be fixed for the whole industry for a term of approximately seventeen years. The board passed a resolution authorizing the executive committee to negotiate a license agreement, provided that the United States Gypsum Company, by virtue of the agreement with National and with other manufacturers of gypsum wallboard, would control the price of wallboard sold in the United States.

47. During the negotiation for the bubble license in the summer of 1929, Holland of Universal charged USG with infringement of Universal's Hite and Haggerty "starch patents." The Haggerty patent, issued on July 8, 1924, related to a lightweight gypsum board employing starch or a cooked carbohydrate in the core of the board to secure a good bond between the core and the paper liners. Prior to July 25, 1929, Avery spent considerable time with Holland trying to work out some mutually satisfactory proposition for buying the starch patent, or licensing the industry under both the starch and bubble processes.

48. On July 25, 1929, subsequent to Universal's charges of infringement against USG, the licensees met again in Chicago and discussed the question of accepting a license under the "bubble board" invention. At this meeting

the subject of USG's infringement was brought up;
 12562 USG advised those in attendance that, in the interest of harmony, it had been making some tests to see if there was any value in combining the two processes. Those in attendance understood that by combining the starch and bubble inventions in one license agreement, such an arrangement would provide a means for immediate price control. They wanted price control under the new licenses to continue without any break. The meeting adjourned with the understanding that there would be further conferences between Universal and USG within the next ten days; and that another meeting of licensees would be held in Chicago on either August 5th or 6th when the situation would be discussed further.

40. Such a meeting of licensees was held in Chicago on August 6, 1929, the day on which the Utzman patent expired. It was decided at this meeting that Universal would assign its "starch patents" to USG, and USG in turn, would issue a single license contract with price control covering all patents and patent applications. Those in attendance accepted the views of their attorneys that such a contract would be exceptionally strong and price control could be maintained for the life of the contract without difficulty. They signified that they were willing to sign on this basis.

50. The Haggerty "starch" patent and the third Roos "bubble" application related to a process for making a "porous" or "cellular" board. They both related to a light-weight gypsum board having insulating qualities. Both the third Roos bubble application and the Haggerty starch patent were competing non-infringing inventions.

51. On August 27, 1929, the board of directors of National held a meeting at which the president was authorized to sign
 - a license with USG covering the "bubble board"
 12563 and the "starch patents," provided, however, that all of the existing licensees of USG would enter into a similar license; and provided further, that in the judgment of the president of National, such action would result in legal stabilization of the markets.

52. Between October 8 and October 21, 1929, Niagara, Certain-teed, National, Ebsary, and Atlantic executed licenses with USG to become effective when Universal's receiver transferred the starch patents to USG. One of the reasons USG purchased the starch patents was to secure issued patents upon which price-fixing could be based. On November 5, 1929, the starch patents were assigned to USG, and on the same date Universal also accepted a

license. On November 25, 1929, American settled its litigation with USG and accepted a license. All manufacturers of gypsum board in the Eastern area were now licensed by USG, except Kelley Plasterboard Co., and that concern executed a license in April of the following year. Texas, a licensee under the Utzman patent, did not accept a license under the starch and bubble board patents until 1937.*

53. The contracts which became effective in November, 1929 were in substantially identical terms. The license with Universal contained preferential royalty terms which were granted as consideration for the transfer of the starch patents; every other license (except that of Texas) provided that if the licensor should subsequently grant more favorable terms to any licensee (except Universal), the same more favorable terms would be granted to the first licensee. Each licensee agreed to pay as royalty a stipulated percentage on the selling price of all 12564 plasterboard and gypsum wallboard of every kind, whether or not made by patented processes or embodying product claims. Each licensee was authorized to use certain patents in packaging gypsum board, and the licensees agreed to pay royalties on packages of all kinds, whether or not packaged under the claims of the patents. While the contract covered fifty patents and seven applications, the only new patents and applications for patents which were not already licensed by the previous agreements were the Hite and Haggerty "starch" patents, three applications by Roos on the "foam" process, and the Bayer application. The contract was to run until the most junior patent expired. As two "bubble board" patents were issued in 1937, the licenses ran until 1954. The licensees agreed not to sell patented wallboard to manufacturing distributors unless USG gave its written consent as to each prospective purchaser. Jobbers were defined as those who did not manufacture but who bought and sold board in straight or mixed cars and who did not sell at retail. No consent was required to sell to them. The licensees acknowledged, and agreed not to contest, the validity of any patents then issued and of any patents subsequently to be issued on applications described in the agreement. As in the previous contracts, USG reserved the right to fix the minimum price at which each licensee sold board embody-

*The licenses mentioned in this finding will subsequently be referred to as the November 1929 agreements.

ing the licensor's patents, the licensor agreeing that such minimum price would be not greater than the price at which the licensor itself offered to sell.

E. The Newark and Celotex Board Licenses

54. Newark Plaster Company acquired Kelley Plasterboard Co. in 1937. At the time of this acquisition, officers of Newark talked with officers of USG and were conversant with the general licensing arrangement 12565 that existed in the industry. Newark assumed the license to Kelley.

55. Celotex did not become a licensee until 1939. American, the predecessor of Celotex, had long been an active licensee when Celotex took over its business. American's license with USG was assigned by American to Celotex on April 12, 1939. Celotex admits that USG entered into similar agreements with National, Universal, Atlantic, Ebsary and Certain-teed. Celotex also admitted that from the year 1939 to the date of filing of this complaint, USG has determined and fixed minimum selling prices and terms and conditions of sale at which it has sold board.

F. The Metallized Board Licenses

56. "Metallizer board" is ordinary gypsum board or gypsum lath where one surface of the "board" has affixed thereto a paper-thin sheet of metallic foil. Generally speaking, it may be manufactured by the same process that is usually employed in the manufacture of ordinary board or lath. However, since the commonest purpose of using this type of "board" is to reflect both heat and cold, and since its most common use in the building field is to provide insulation, it is usually used as lath. The metallic foil side is placed next to the studding; and the plaster coat is applied to the room side of the "board." Usually it is made in the same dimensions as ordinary gypsum lath.

57. By 1934 the industry had been operating under price-fixing license agreements for a period of approximately five years. By that time, as will be later found, the industry had been thoroughly organized at all levels and its prices had been stabilized. At a meeting of board licensees held on May 23, 1934, USG presented to those present a price-fixing license agreement relating to metallized 12566 board. It was the intention at this time to bring all existing licensees under this new license agreement. In August 1934 USG wrote to its licensees and ask-

ed them for an expression of their intentions as regards this license. By September 1934, National, Certain-teed, American and Universal expressed their willingness to become licensees. Eventually all the manufacturers who were licensees under the so-called November 1929 license agreements, except Texas and Niagara, became licensees of USG under substantially identical licenses relating to metallized board. These licenses were entered into late in 1934 or early in 1935 and are in force at the present time. The manufacturers who became licensees knew at the time they entered into the license agreement that their license contract was not to be a separate and isolated transaction but was to be part of a larger price-fixing patent license arrangement on metallized board which was to embrace all or substantially all of the then existing licensees of USG.

58. From the time these agreements were entered into, USG has fixed and determined the minimum price and terms and conditions on which metallized board has been sold. USG's price-fixing was based upon a provision in the license which reserved to them the right to determine, during the existence of said patent and so long as said rights, licenses and privileges thereunder should continue, the minimum price at which the licensee should sell board having a metallized surface which was covered by Roos Patent (Patent No. 1,914,345, relating to metallized board) or any of the patents set forth in Schedule A attached to the license. Neither Roos Patent No. 1,914,345 nor any of the patents referred to in Schedule A are in evidence in this case.

59. Celotex assumed American's metallized board license; Newark assumed the Kelley license. Both 12567 Celotex and Newark knew that the metallized board licenses were substantially industry-wide arrangements. Texas was not a licensee under the metallized board agreements.

G. The Perforated Lath Licenses.

60. Perforated lath is ordinary gypsum lath with holes bored or stamped through it. The claimed purpose of placing holes in the lath is to allow the plaster to penetrate through the holes and form a mechanical key on the reverse side to hold the plaster to the lath better. Since perforated lath is a substitute for ordinary lath, it is made in the same dimensions as ordinary lath.

61. Perforated lath is old in the art. As early as September 7, 1917, Makowski applied for a patent on a board

of this type of lath and on August 17, 1920, United States Patent No. 1,349,778 was issued on the application. Even prior to that date, six United States patents had been issued on that type of lath.

62. In 1936 USG offered to its licensees a price-fixing license to manufacture and sell perforated gypsum lath under Roos Patent No. 1,938,354. In order to get an expression for the industry on this proposal, USG called a conference of licensees to meet on March 11, 1936. The conference was held on that date and representatives of USG, Atlantic, American, National and Certain-teed attended. At that conference USG advised those present: (a) that USG proposed to place this type of lath on the market about April 1, 1936; (b) that USG would be willing to license all licensees to manufacture and sell this type of lath on a 10¢ royalty basis; (c) that USG proposed to set a minimum price of \$15.25 per thousand square feet; and (d) that USG would furnish those who accepted the

new license with their requirements of perforated lath at the usual manufacturers' discount, pending installation by the licensee of equipment for manufacturing this type of lath. This proposal did not meet with the unanimous approval of those present. The licensees pointed out to USG: (a) that the plan to offer this type of lath to the trade on April 1, 1936, did not afford to the industry sufficient time for any proper consideration of all factors involved; (b) that the royalty proposed was too high; (c) that the proposed minimum price was too low and should be at least \$16.00 per thousand square feet; and (d) that the proposed patent under which the licensees were to be licensed was of doubtful validity since perforated lath had been marketed on the Pacific coast for the past twenty years under such trade names as "Key Hold," "Button Lath," and "Lock Lath." The price at this time fixed by USG for ordinary gypsum lath was \$15.00 per thousand. This meeting was adjourned without the licensees coming to any definite decision.

63. Between June 8, 1936, and June 23, 1937, Certain-teed, Ebsary, American, and Kelley became licensees of USG under substantially identical contracts relating to Roos Patent No. 1,938,354; in each license USG reserved the right to fix and determine the minimum price at which the licensees should sell perforated lath. These licenses, except the American license, are in force at the present time. The manufacturers who became licensees knew at the time they entered into the perforated lath agreements that

their license contract was not to be a separate and isolated transaction but was to be part of a larger price-fixing patent license arrangement which was to embrace all or substantially all of the then existing licensees of USG. The perforated lath patent, Roos Patent No. 1,938,354, is not in evidence in this case.

12569 64. USG first fixed a price of \$15.25 per thousand at which it and its licensees would sell this type of lath. This represented an advance of 25¢ per thousand over ordinary lath. USG maintained this 25¢ differential until 1938, when the price for perforated lath was made the same as that of ordinary lath. At this time USG, recognizing that it could not bring the whole industry under this license, offered to give all its licensees a royalty-free license under its perforated lath patent. Since acceptance of the license involved recognition of the validity of the USG perforated lath patent, National and Texas refused to become licensees either under the royalty-free agreement or, for that matter, under the original agreement. Celotex did not assume the American license; Newark became a licensee under the royalty-free license.

65. Since 1936 when USG placed its perforated lath on the market, National and Texas have sold the perforated lath marketed by them at the same prices at which USG and its licensees have sold their lath. No action has ever been brought by USG for the infringement of its perforated lath patent. It is fair to assume that USG has strong doubts as to the validity of its perforated lath patent and has been reluctant to disturb the peace and harmony established by prior license agreements.

IV. THE OPERATION AND EFFECT OF THE CONSPIRACY

66. The execution of the last four license agreements in May 1929 and subsequent execution in the latter part of 1929 and the first part of 1930 of the so-called November 1929 licenses, marked a turning point in the gypsum industry. Prior to the signing of the last four May 1929 agreements there had been keen and vigorous price competition throughout the gypsum industry among the licensee manufacturers of USG on the one hand, and, on the other hand, the non-licensee manufacturers of gypsum products. There was no price competition on board among the licensee manufacturers of USG. However, during this same period, the non-licensee manufacturers actively competed price-wise among themselves and also with the licensees of USG in the sale of their products, including board.

67. The price competition referred to above brought about, during the years 1927, 1928, and the first quarter of 1929, substantially lower prices on board and other gypsum products sold to dealers over the price prevailing in 1926 and previous years. By 1928 wallboard sold for between \$12.00 and \$14.00 per thousand. USG, in order to hold Sheetrock, its first quality wallboard, on the market, sold that board for \$18.00 per thousand. It quoted its Crown board, a sub-standard board, at \$14.00 per thousand. During this same period, plasterboard sold for between \$10.00 and \$12.50 per thousand. During the first quarter of 1929, due to the rapidly declining prices on Crown, it was necessary to adjust the prices on Sheetrock to lower levels in most markets.

68. The first price bulletin issued by USG to its licensees in May 1929 at the meeting in the Palmer House, Chicago, set a mill-base price of \$20.00 per thousand square feet on first grade $\frac{3}{8}$ " wallboard at Oakfield, N. Y., and at 12571 each of the six other listed basing-points. The price for $\frac{3}{8}$ " plasterboard, including lath, was put at \$13.50 per thousand feet at the seven basing-points. These prices represented a very substantial increase over the prices prevailing in 1927, 1928, and the first quarter of 1929.

69. By July 9, 1929, a series of price bulletins issued by USG to its licensees had rapidly increased to \$22.50 per thousand the price of first quality wallboard, and thereafter, during a period of depression and falling prices, to a high in 1934 of \$28.50 per thousand. During the same period, USG fixed the prices of plasterboard or lath at substantially increased prices. During the same period, as the licensees fully anticipated, the price of plaster and other related gypsum products improved over that existing during 1927, 1928, and the first quarter of 1929.

70. During the period commencing with May 22, 1929, and continuing down to July 8, 1941 (except during the period from August 6, 1929, to the effective date of the first of the November 1929 license agreements, and except in the case of Texas, during the period from August 6, 1929 to February 10, 1937), USG sent out to its licensees identical minimum price bulletins under the various license contracts. USG and each licensee, in the main, sold gypsum board manufactured by it at the prices and upon the terms stipulated in the bulletins.

71. In order to obtain a uniform—and hence non-competitive—delivered price, USG in its price bulletins specified

a basing-point system for delivery and arbitrary billing weights to be used by each licensee in calculating prices on rail shipments. The dealer price was to be the lowest combination mill price and all rail freight from such mill to destination, calculated on the basis of specified uniform billing weights. However, all mills were not basing-point mills. In addition the parties were each to charge exactly the same stopover, switching, and other extra delivery charges. The result was that each manufacturer charged identically the same price to the dealer, either absorbing an extra freight cost or charging the dealer with phantom freight, depending on the location of its mill.

72. The defendants have raised, fixed and stabilized the prices of board and their conduct in this respect constitutes an undue and unreasonable restraint and monopolization of trade.

73. The increase in the price of first-grade closed-edge board did not mark the full advance in prices on board, for first-grade closed-edge board, even at \$18.00 per thousand, was being driven off the market. In the first quarter of 1929 more than half of USG's sales of board consisted of Crown, a sub-grade No. 2 board,* which even in 1928 was being priced as low as \$14.00 a thousand to sell in competition with the \$12.00 open-edge board sold by Certain-teed.

74. The parties to the license agreements understood that price control would best succeed with a uniform product. They anticipated that one result of industry-wide licensing would be the elimination of No. 2 board.

75. When the first May 1929 price bulletin was issued by USG to its licensees, the price of No. 2 board was advanced to \$17.50 per thousand. About two weeks later this price was raised to \$18.75; and on June 26, 1929, it was raised to \$20.00 per thousand. Thus, in a period of about five weeks the price of No. 2 board was raised from a low of \$14.00 to \$20.00 and made the same as that for first-quality board. On July 9, 1929, the price of first-quality board was raised to \$22.50 per thousand. In this bulletin no price was specified for No. 2 board nor has any been specified in any subsequent price bulletin for that type of board, which meant that No. 2 board was to be sold at the same price as first-quality board.

* A No. 2 board is a board made of lower grade material than that used in the manufacture of first quality board.

Obviously, no one would pay for No. 2 board the same price for which first-quality board could be obtained.

76. The defendants have eliminated No. 2 board from the market and their conduct in this respect constitutes an undue and unreasonable restraint and monopolization of trade.

77. Substantially the same course was followed in the elimination of "second"* as was pursued in the elimination of No. 2 board, except that "seconds" were not as rapidly eliminated from the market. However, the parties anticipated that one result of industry-wide licensing would be the elimination of "seconds."

78. The price bulletins issued by USG to its licensees reveal that by successive steps during a period of slightly more than six weeks subsequent to May 23, 1929, the price of seconds was raised respectively to \$15.00, \$16.25, \$17.50, and on July 9, 1929, to \$20.00 per thousand. The differential in price between $\frac{3}{8}$ " Sheetrock at \$22.50 per thousand and seconds was then only \$2.50. By letter dated April 7, 1930,

USG advised its licensees that thereafter the price of seconds would be the same as the price of first-quality board. Obviously, no one would pay for seconds the same price for which first-quality board could be obtained. No price bulletins have been issued for seconds since that time.

79. The defendants have eliminated seconds from the market and their conduct in this respect constitutes an undue and unreasonable restraint and monopolization of trade.

80. Prior to the signing of the last four May 1929 agreements, open-edge board actively competed with the closed-edge board. At that time, Certain-teed, American, Niagara and Ebsary manufactured and marketed open-edge board.

81. The years 1927-1929 had demonstrated that USG and its then licensees could not maintain a price of \$30.00 per thousand for first-quality closed-edge board, or even \$25.00, or \$20.00, or \$18.00 when forced to compete with open-edge board for business.

82. The parties to the license agreements understood that it was essential to the success of price control that unpatented open-edge board, No. 2 board, and seconds be taken off the market. Each understood that there could be

* A "second" is a defective board produced unintentionally in the process of manufacturing first-quality board.

no effective stabilization of prices on closed-edge board as long as open-edge board was sold without price control.

83. The parties to the license agreements anticipated that one result of industry-wide licensing would be the elimination of open-edge board from the market.

84. The provision in the license agreements that royalties should be paid on the sales of all board sold, whether patented or unpatented, tended to discourage the manufacture and sale of open-edge board.

12575 85. Shortly after the signing of the last of the four May 1929 license agreements, those licensees who were then making open-edge board ceased to manufacture that type of board and shortly thereafter open-edge board was completely eliminated from the market.

86. The defendants have eliminated open-edge board from the market and their conduct in this respect constitutes an undue and unreasonable restraint and monopolization of trade.

87. In the price bulletin of May 24, 1929, USG provided that the standard sizes of patented gypsum boards were: 32 and 48 inch widths, and from 4 ft. to 12 ft. lengths, inclusive. By subsequent bulletins a more elaborate and detailed description of so-called standard sizes of board was provided. So-called non-standard or odd sizes could be manufactured and sold, but the bulletins provided that they could only be sold at price differentials which in some cases amounted to as much as \$5.00 per thousand. The prescribed differentials were not only unrelated to the degree of variation from standard, but were prohibitive. This standardization was possible only because all manufacturers were parties to the license agreements.

88. The defendants have standardized board and their conduct in this respect constitutes an undue and unreasonable restraint and monopolization of trade.

89. USG owned Birdsey patent No. 1,696,877, which related to a process for applying a gummed tape along the side edges of a bundle of several pieces of lath. In the May 1929 agreements the purpose of USG to force this type of bundle on the industry was made explicit. In those agreements it was expressly provided that the li-

12576 censees would use only that bundle and would not use any other bundle or method of bundling board. When the November 1929 agreements were drafted the above provision was not contained in those agreements. However, it was provided that the licensees would pay

USG a royalty of ten cents per thousand whether or not the bundles were made according to the claims set forth and claimed in the patents.

90. The bundling of lath in the industry under the above patent was standard practice by the manufacturers. This standardization of packaging was brought about by two factors: (a) all the manufacturers were parties to the license agreements; and (b) the provision in the license agreements that royalties should be paid on all bundles whether or not the bundles were made according to the claims of the patents, for all practical purposes, forced the licensees to adopt that type of bundle.

91. The defendants have standardized the packaging of board and their conduct in this respect constitutes an undue and unreasonable restraint and monopolization of trade.

92. The parties to the license agreements understood that an industry-wide licensing arrangement whereby the price of board would be fixed and stabilized, would also tend to stabilize the prices of all other unpatented gypsum products. The parties anticipated that price stabilization on board would be accompanied with price stabilization of all other unpatented gypsum products.

93. USG price bulletins to its licensees provided that any sale of patented products, though ostensibly made at or above the minimum price established by licensor, 12577 would nevertheless be considered a violation of the provisions of the license if licensee directly or indirectly reduced the actual price charged by licensee below such minimum price by reducing the price of other products.

94. From time to time, numerous complaints were filed with Board Survey* by various licensees charging the licensor and other licensees with reducing the price of plaster or other unpatented gypsum products sold in conjunction with board. By the filing of these complaints, it is apparent that the licensees understood that they were expected not to reduce the price of plaster or of other unpatented gypsum products.

95. USG, although often requested by its licensees to do so, refused to give its consent for the sale of board at a discount to Cardiff Gypsum Company, a plaster manufacturer, for the reason that Cardiff had a reputation as a price cutter of plaster. The exclusion of this manufacturer of plaster from access to a source of supply of board

* The functions of Board Survey are hereinafter described in Finding 130.

would seriously affect the ability of such manufacturer to sell his plaster and would have the effect of facilitating the control of plaster prices.

96. The defendants attempted to stabilize the prices of plaster and other unpatented gypsum products and their conduct therein constitutes an undue and unreasonable restraint of trade.

97. Jobbers of board (hereinafter referred to as jobbers), as they are defined in the November 1929 license agreements, were those who did not manufacture but who 12578 bought and sold plasterboard or gypsum wallboard in straight cars or in mixed cars with other building material and who did not sell at retail.

98. Prior to May 1929 it was customary in the gypsum industry, as in the mason's supply business generally, for manufacturers to distribute their products through jobbers. Plaster and gypsum products other than board are still sold that way. The May 1929 licenses recognized the practice but, for the first time, required that licensees obtain USG consent before selling manufacturers of plaster or gypsum products, or jobbers of such products, who did not or may not manufacture gypsum wallboard.

99. The price bulletin of May 24, 1929, sent by USG to its licensees, provided that the minimum prices to manufacturers and jobbers of gypsum products was to be at a 10% discount from minimum list prices.

100. The November 1929 agreements were drafted to read differently than the May 1929 agreements, and the licensees were not required to obtain USG consent to sell to jobbers.

101. On August 8, 1930, the price bulletin issued by USG to its licensees provided that, effective that date, the price to jobbers and distributors was to be the same as the price to the regular dealer trade.

102. The purpose and effect of the leveling off of prices by the bulletin of August 8, 1930, was to eliminate jobbers of board from the gypsum industry. Jobbers could not buy in car lots at dealer prices and resell to dealers at those same prices; dealers would not buy at higher prices from jobbers when they could buy directly from a licensee at bulletin prices.

12579 103. After the bulletin of August 8, 1930, was issued the parties to the license agreements concertedly policed the sales practices of the others to see that the jobber regulation was complied with. The parties to the license agreements frequently brought up and discussed at

licensee meetings* alleged sales by others to jobbers at a discount. This practice of calling the alleged violation of a particular manufacturer to the attention of the other parties to the licenses was an effective means to assure future compliance with the jobber regulation. The recalcitrant offender disliked to have his violations publicly aired before other licensees and usually promised to correct his sales practices in the future so as to comply with the jobber regulation.

104. A licensee would also police the jobber regulation by filing written complaints with USG or with Board Survey calling attention to the fact that jobbers were still doing business in the industry and requesting that the situation be straightened out. These complaints would be investigated. Calling the licensor's attention to the violations of the jobber regulation was an effective means of assuring that the jobber regulation would be complied with in the future.

105. The defendants have eliminated jobbers of board in the industry and their conduct in this respect constitutes and undue and unreasonable restraint and monopolization of trade.

106. In the gypsum industry there are manufacturers of calcined gypsum and plaster who do not manufacture board.

Those manufacturers of plaster who do not manufacture board but who sell board which they purchase from USG or its licensees are designated in the complaint as manufacturing distributors. According to the terms of the November 1929 license agreements, sales could be made to manufacturing distributors at a discount from the dealer price, but only with the written consent of USG.

107. This consent clause was incorporated in the November 1929 licenses, by Avery's express statement, as a means of controlling the resale price of manufacturing distributors. USG intended, if it should ever develop that a manufacturing distributor was reselling board below the fixed dealer price, to withdraw its consent, in order, as Avery stated, not to defeat the license. By "defeat the license" Avery could only have meant defeating price control.

108. From time to time USG gave its revocable consent to its licensees to sell board to particular manufacturing distributors at a discount from the dealer price. USG also

* The practice of holding licensee meetings is hereinafter discussed in Findings 134 to 136 inclusive.

sold board to certain manufacturing distributors at a discount.

109. The manufacturing distributors who were sold board at a discount were also furnished by their suppliers with the supplier's price lists on board. The prices on board in these price lists were the identical prices which USG specified in the price bulletins sent to its licensees.

110. The manufacturing distributors understood that on sales of board they were expected to maintain the same prices, terms and conditions of sale that their supplier maintained, or otherwise they would lose their source of supply.

111. Some of the licensees of USG labored under 12581 the mistaken notion that the patent laws of the United States gave to the owner of a patent the right to control, even down to the ultimate consumer, the resale prices at which patented products could be sold.

112. USG and the licensees policed the prices at which manufacturing distributors resold board. When USG or Board Survey discovered that a manufacturing distributor's resale price on board was less than that currently specified as the minimum price in the price bulletin, or that the distributor's terms and condition of sale were more liberal than those specified in the price bulletins, USG or Board Survey would call those facts to the attention of the particular licensee supplier of the distributor and request the supplier to investigate the matter and advise USG or Board Survey. In turn, the supplier would contact the particular manufacturing distributor and make inquiry of him concerning his price policy or board, or concerning the terms and conditions on which he sold board. The licensees reported to USG or Board Survey the results of the inquiry. Such an inquiry by a supplier could only be construed by the manufacturing distributor as a veiled threat that if he did not follow the prices, terms and conditions of sale on board, as maintained by his supplier, he would lose his source of supply.

113. Kelley, a licensee of USG, expressly threatened a manufacturing distributor to whom he was furnishing board, that unless the distributor maintained in the future the same prices, terms and conditions of sale on board as were specified in the price bulletins, the distributor would not be supplied by the licensee with board. USG knew of and approved of this threat by the particular licensee supplier.

114. The defendants have attempted to control the resale prices of manufacturing distributors and their actions therein constitute an undue and unreasonable restraint of trade.

115. The Cardiff Gypsum Company has for many years owned gypsum properties in the vicinity of Fort Dodge, Iowa, and operates a plaster mill at that place. Its plaster and other related products are widely sold throughout the middle west. The company has at no time manufactured gypsum board or lath. Its position in the gypsum industry has thus long been substantially that of Oakfield Gypsum Products Corporation, Connecticut Adamant Plaster Co., and other manufacturing distributors named in the bill of particulars to the complaint.

116. Beginning in 1933 and continuing down through most of October 1939, Sensibar of Cardiff Gypsum Company contacted Universal, American, Certain-teed, USG, National, and Ebsary for the purpose of purchasing board from them at a discount. Each of the above companies, except USG, signified its willingness to sell board to Cardiff at a discount, providing USG would give its consent so to do.

117. During this same period USG and the above licensees sold board at a discount to other plaster manufacturers and, in the case of the licensees, USG consented to the sale thereof.

118. During this period USG refused to sell board at a discount to Cardiff and also refused to give its consent to its licensees so to do. Without USG consent the licensees refused to so sell Cardiff. Cardiff has never been able to purchase board at a discount from USG or its licensees.

119. The defendants have excluded Cardiff from the board market and this exclusion constitutes an undue and unreasonable restraint and monopolization of trade.

120. In addition to fixing the prices and regulating the terms and conditions of delivery of its licensees on an all-rail shipment of board by means of a basing-point pricing system of distribution which was new to the industry, the price bulletins sent out by USG also prescribed prices on board and regulated its delivery under two other methods which likewise were new to the industry: (a) so-called "trucking area" in which the manufacturers could deliver board by truck; and (b) "pick-ups" by dealers' truck at certain designated mills and warehouses.

121. From time to time USG sent to its licensees price bulletins which defined and designated certain areas

throughout the United States as trucking areas. In those areas the price bulletins permitted the manufacturers to deliver by truck certain specified minimum quantities of board at a specified delivered price.

122. In the specified trucking areas the price bulletins regulated the point where the manufacturers could deliver board; that is to say, deliveries could be made to the dealers' warehouse but not to the job site where the board was to be used.*

123. In the specified trucking areas the price bulletins designated the parties who could make delivery of board.

Delivery had to be made by the manufacturer's own 12584 truck or those hired by the manufacturer from regular trucking companies. A manufacturer was thus prohibited from hiring a dealer's truck to make delivery.

124. In the specified trucking areas the price bulletins specified the amount of dunnage to be placed in trucks and the manner of placing it thereon. They also defined "mixed loads" as consisting of gypsum board and/or lath and other gypsum materials.

125. The price bulletins sent out by USG to its licensees, in effect, prohibited a manufacturer from trucking into a non-trucking area or from delivering in a trucking area less than a minimum quantity of board. The bulletins did not expressly forbid a manufacturer to deliver smaller quantities to a dealer in one load, or deliver by truck outside a designated area, but the only price designated by USG for such deliveries was the less-than-car-lot freight rate and that rate was so high that nobody would buy at that price.

126. From time to time, USG sent price bulletins to its licensees which designated certain mills and warehouses throughout the United States at which dealers could pick up board by truck from the manufacturers. The price at which it could be picked up by dealers, as well as the minimum amount which the dealers could pick up at those prices, was also specified by the bulletins.

127. The parties to the license agreements policed the trucking practices of other manufacturers to assure uniform delivery practices. * Alleged violations of trucking regulations were brought up and discussed at licensee meet-

* The regulations mentioned in Findings 122 to 126 inclusive, do not exhaust all the regulations relating to "trucking areas" and "pick-ups." They are set forth here merely as illustrations of the minuteness of regulation which the manufacturers signified they were willing to accept as a corollary to price control.

ings. The practice of calling the alleged violation of a particular manufacturer to the attention of the other parties to the licenses was an effective means of assuring
12585 future compliance with the trucking regulations.

128. The adoption by each of the parties to the license agreements of:

- (a) an all-rail basing-point arrangement for delivery;
- (b) a trucking area arrangement for delivery; and
- (c) a truck pick-up arrangement for delivery from certain mills, as methods for the distribution and delivery of board; the fact that under each method the bulletins regulated in considerable detail the practices each manufacturer followed in making delivery; and the further fact that the parties to the agreements policed the trucking practices of other manufacturers, had the effect of eliminating all competition on board between USG and its licensees at the distribution or service level.

129. The defendants have eliminated all competition on board at the distribution or service level and their conduct therein constitutes an undue and unreasonable restraint and monopolization of trade.

130. In 1932 USG set up as a department a wholly owned corporation called Board Survey to act as an enforcement agency. USG notified its licensees that the company had been formed and invited them to send in all instances of violations of any of the board license agreements which might come to their attention. USG or any of the licensees was to furnish all data which they were able to collect evidencing the apparent violations. Board Survey was then to make a through check-up of all reported violations and take such action as was necessary to enforce USG's rights under the license agreements.

12586 131. In the next several years the manufacturers of board filed many complaints charging USG or its licensees with violating the price provisions or other regulations of the price bulletins. These complaints were investigated by USG or Board Survey.

132. The filing of complaints by the manufacturers and Board Survey's investigation of them was done for the purpose of trying to keep the licensees in line; it was an effective means of assuring that the price bulletins would be adhered to.

133. The defendants have participated in either the formation or the activities of Board Survey and their conduct in this respect constitutes an undue and unreasonable restraint of trade.

134. Beginning with June 6, 1929, and continuing down through March 17, 1937, USG and its licensees held a series of so-called "licensee meetings." Between March 10, 1931, and March 17, 1937, eighteen such meetings were held. These meetings were customarily attended by the following parties to the licenses and each was represented by one or more persons: USG, National, Certain-teed, Ebsary, Atlantic, American, Kelley and Universal.

135. It was at these licensee meetings, held during the summer of 1929, that the board manufacturers met and traded out the terms and conditions which were later incorporated in the November 1929 license agreements.

136. At these licensee meetings the prices and terms and conditions of sale for board prescribed by USG in the various price bulletins were discussed or complaints of alleged violations by the manufacturers of the bulletin prices and terms and conditions of sale were brought before the meeting. What the board manufacturers actually 12587 did at these meetings was to work out, concertedly, the details of the distribution system which had been established generally under the license agreements. Some of these were later incorporated into price bulletins and became the written law of the industry. Among the topics covered are those set forth in Findings 137 to 153, inclusive.

137. At the meeting of June 6, 1929, the problem of how to classify dealers was raised. For example, at this meeting the question whether or not mail order houses were to receive a 10% discount from the dealer price was discussed; also whether or not "house wreckers," known as "bathtub yards," were to be classified as dealers; and whether or not the industry would treat the federal government as a dealer and sell it on that basis. It was determined that mail order houses, house wreckers, and the federal government were to be sold as dealers.

138. The jobber regulation presented a reoccurring problem. Jobbers and licensees selling through jobbers were discussed at the meetings of June 6, 1929, October 17, 1932, November 15, 1932, and December 13, 1932.

139. At the licensee meeting of October 17, 1932, the licensees were afforded an opportunity to have the price control feature eliminated from the licenses, or at least, to express their opposition to price control. The meeting was called to consider the many alleged violations of the price bulletins disclosed by USG's audit of its licensees' sales of board. Counsel for USG conducted the meeting and the

licensees present were those mentioned in Finding '2588 134. After classifying the various types of violations which the audit revealed, counsel for USG stated that if the situation did not improve there were only three things to do: either to cancel the licenses; or for USG to institute damage suits against the licensee; or to eliminate the price control feature entirely from the licenses. Although the licensees were here afforded an opportunity to eliminate price control from the licenses, not a single licensee spoke up in favor of eliminating it.

140. At the meeting of October 17, 1932, the licensees' practice of employing salesmen to sell board on a commission basis was discussed. USG took the position that the employment of commission men was a bad practice and that it would have to be discontinued. No one present objected. One week later, on October 24, 1932, USG issued a bulletin which provided that it would be a violation of the license for any licensee to pay a commission to a salesman for the sale of board even though he sold it at the correct prices and did not split the commission with the dealer. Moreover, commission salesmen were not to be employed in any case without the written consent of the licensor. The same subject was brought up for discussion at the licensee meetings of November 15, 1932, and December 13, 1932.

141. Another matter brought up at the meeting of October 17, 1932, related to dunnage. The complaint was that the licensees were putting in an unusual number of boards as culls, for packing, which in reality were first class material and therefore those involved were guilty of giving rebates. USG took the position that the practice would have to cease.

12589 142. Substantially the same complaint was made at the meeting of November 15, 1932, whereupon USG asked that each licensee mail to Board Survey a complete statement of the amount and kind of dunnage it used.

143. At the meeting of December 13, 1932, USG announced that each of the eight licensees had made a dunnage report. The average was 610 square feet per car, and USG announced that since most of the companies were using between 500 and 600 square feet, that would be considered a fair amount of board to be used as dunnage to properly pack a car.

144. On December 22, 1932, USG issued a bulletin dealing with dunnages. In later bulletins the regulations were further elaborated, and also made to apply to truck deliveries. It was later provided that all gypsum board used

as dunnage should be plainly stamped in red on the face side of each board, showing the words, "Dunnage—Not to Be Sold," in letters at least three inches high, and be defaced, marred, diagonally scored or mutilated, and otherwise so marked that they would have no value and would be unfit for use or resale.

145. On April 12, 1932, USG issued a bulletin which provided that extending other than regular terms to dealers would be construed as a rebate and in violation of the minimum price provisions of the licenses. The subject of discounts was brought up at the meeting of October 17, 1932, and discussed. It was asserted that some or all of the licensees had granted excessive discounts contrary to this bulletin.

146. At the meeting of December 13, 1932, USG 12590 brought the matter up again. Terms in the lumber trade often run 30, 60, 90 or 120 days, while in the cement, lime, and gypsum business shorter terms had prevailed. At this meeting those in attendance were requested by USG not to offer these long terms, and everyone present agreed that that was a good practice to follow.

147. The phrase "other than regular terms" in the bulletin of April 12, 1932, was also intended to regulate the medium of payment. USG, at the October 17, 1932, meeting, complained that National had taken Chicago World's Fair bonds in payment for board. Later, at the meeting of December 13, 1932, USG told the licensees that they were not to voluntarily offer to take notes, or offer to take trade acceptances, or to take bonds or other securities, in lieu of cash, as an inducement to make a sale. On July 29, 1933, Board Survey investigated a complaint that National had accepted a certificate of deposit in a closed bank as payment.

148. The bulletins also regulated the manner of quoting prices in bidding on contracts. It was considered a violation of the license to deduct in advance the amount of the cash discount on bids.

149. The bulletin of April 12, 1932, provided that the establishment of warehouses by a licensee at a dealer's place of business would be construed as a rebate and in violation of the minimum price. In the same bulletin "consigning of stocks" to a dealer was construed as a rebate. Both matters were discussed at the meeting of October 17, 1932. The purpose and effect of this bulletin was to eliminate both types of competition and place the entire industry on a "regular terms" basis.

12591 150. At the meeting of December 13, 1932, the subject of truck deliveries to the job site was discussed. From the first, the bulletins had quoted only a price to dealers' warehouses. Subsequent bulletins also restricted the licensees to the use of their own trucks or those of independent truckers; dealers' trucks could not be hired. The complaint at this meeting was that some dealers, when receiving a truck delivery from a licensee, would pay the driver a small sum to carry the load on and deliver it at the job. USG advised the licensees that this was actually the same as if the manufacturer was making the job delivery, and that when the licensees hired trucks they would have to see that the haulers abided by the regulations just as though they were the licensees' own trucks.

151. The advertising policies of the licensees also came up for discussion at the meeting of October 17, 1932. The complaint was that a great many of the dealers were demanding that the licensees buy advertising matter, or paint fences for them, or decorate their offices, or furnish materials with which to fix up their offices, without charging for it. USG told those in attendance that such advertising policy would have to be corrected.

152. At the meeting of November 15, 1932, a licensee complained that National had given away seven boards to a dealer with which to decorate his office. On November 21, 1932, Board Survey complained that Universal had donated \$100 to a dealer for their ball club. On May 21, 1935, there was a complaint that Certain-teed had allowed a Chicago dealer \$120 to paint a Certain-teed sign extending 65 feet along the dealer's fence. On June 14, 1935, Certain-

12592 teed was charged with painting a sign 8 x 8 feet referring exclusively to its products in front of a Des Moines, Iowa, dealer's office. And a year later, on June 6, 1936, Certain-teed was charged with granting an allowance to a West Virginia dealer for painting a sign advertising Certain-teed products.

153. On May 10, 1935, Board Survey sent a letter to all the licensees asking for a statement of their policies regarding advertising allowances, painting dealers' signs, donations of patented gypsum board for dealers' offices, donations of carpenters' aprons or the sale of such below cost, and concessions of like nature. Thereafter, in the bulletin of September 16, 1935, USG provided broadly that minimum prices must not be reduced by allowances for any other reason whatsoever. In its bulletin of February 6, 1939, the licensees were expressly forbidden to grant allow-

ances for advertizing or other purposes, as constituting rebates.

154. The defendants have held licensee meetings for the purpose, and with the effect, of eliminating competition in the gypsum board industry; they have also adopted and followed the terms and provisions contained in the bulletins which were designed to and did bring about the same result. Their conduct in either respect constitutes an undue and unreasonable restraint and monopolization of trade.

155. The price provisions and the terms and conditions of sale contained in the license bulletins constitute an undue and unreasonable restraint and monopolization of trade.

156. The licenses all contained a clause giving USG a right at any time to inspect the books of account 12593 and records of its licensees. This clause in the licenses gave USG the power to check up directly on its licensees as to any possible variation by them from the prices and terms and conditions of sale imposed by the bulletins.

157. From time to time USG has inspected the books of account and records not only to determine that the proper amount of royalties had been paid, but also to determine whether or not the licensees observed the prices and regulations concerning sale imposed by the bulletins.

158. After the audits were made the results disclosing any alleged violations of the terms of the bulletins were called to the attention of the licensees both at licensee meetings and also by correspondence addressed to them.

159. At licensee meetings alleged violations as disclosed by the audit were discussed by the parties in attendance and at these meetings USG requested and insisted upon the cooperation of the licensees in the full observance of the bulletins.

160. In the correspondence, a summary of the alleged violations was furnished the licensees and they were requested to study this data from the standpoint of possible effect of changing conditions upon policies under the licenses. Also they were advised that their suggestions relative to marketing policies which may be necessary to meet these new conditions would be welcomed.

161. The right given USG to examine the books of the licensees; the exercise of that right by USG; the discussions at licensee meetings of the results of the audits; the request and insistence upon the cooperation of the licensees 12594 in the observance of the bulletins; and the correspondence to the licensees following the audit, facil-

itated the elimination of competition in the gypsum board industry and constituted an undue and unreasonable restraint and monopolization of trade.

162. The evidence establishes that defendants associated themselves in a plan to blanket the gypsum board industry under patent licenses and stabilize prices, as charged in the complaint. Since the execution of the last four of the 1929 licenses competition at the price, quality, and service levels has been eliminated in the industry.

163. The undue and unreasonable restraints and monopolization of trade and commerce practiced by the defendants, as hereinbefore found, were, in part, made possible and resulted from the following:—(a) all the manufacturing facilities for board were concentrated in the hands of a few manufacturers, all of whom are defendants herein, and this concentration of productive capacity made concerted action far less difficult than it would otherwise have been, and (b) the attitude of the present defendants, since at least 1929, has been that of mutual cooperation to suppress competition in order to organize the gypsum industry and stabilize prices.

164. The history of the gypsum industry has been one of diminishing members. Three of the present defendants, viz., USG, National, and Certain-teed, who together produce 89% of all board and more than 50% of all plaster manufactured in the Eastern area, have attained their present size, in part, through consolidation, merger, or purchase of competitors' gypsum manufacturing facilities. It is not to be assumed, contrary to common experience, that
12595 any present defendant will abandon the practice of consolidation, merger, or purchase of competitors' manufacturing facilities more completely than they are required to do.

165. Any further acquisition by any defendant of the manufacturing facilities for board or other gypsum products of any manufacturer thereof, through consolidation, merger, purchase, lease, or by any other means whatsoever, will facilitate future restraints and monopolization which would be detrimental to the public interest and would collide with the Sherman Act's protection of the public from evil consequences.

CONCLUSIONS OF LAW

1. The court has jurisdiction of this cause under the provisions of the Act of July 2, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act.

2. A conspiracy of the licensor and each licensee to violate the Sherman Act has been established by independent evidence. Therefore, the declarations and acts of the various members, even though made or done prior to the adherence of some to the conspiracy, become admissible against all as declarations or acts of co-conspirators in aid of the conspiracy.

3. Every act in furtherance of a general plan to restrain trade and commerce among the several states, or to monopolize any part thereof, in violation of the Sherman Act, is illegal regardless of its legality when standing alone.

4. Under the Sherman Act the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded, but that power exists to raise prices or exclude competition and intent so to do is present. The existence of the power to fix prices or exclude competition, coupled with an intent and purpose to exercise that power, constitutes a violation of the Sherman Act.

5. Under the Sherman Act price fixing, without authorizing statutes, is illegal *per se*. There is nothing in the patent statute which specifically gives a patentee a right to fix the price at which a licensee may sell the patented article. The right to fix a licensee's prices is not a part of the patent grant.

6. Where a patentee undertakes to exploit his patent through price-fixing in patent license agreements, he must give consideration to the limitations of the Sherman Act on such action. In such circumstances courts are required to balance the privileges of the licensor and his licensees under the patent grant with the prohibitions of the Sherman Act against combination and monopolies. Concerted action to control prices and distribution by means of patent license agreements constitute a violation of the Sherman Act.

7. Patents grant no privilege to their owners of organizing the use of those patents to restrain trade and monopolize an industry through price control, through royalties for patents drawn from patent-free industry products and through regulation of distribution. In such circumstances such abuse of patent privileges constitutes a violation of the Sherman Act.

8. Where a patentee, acting in concert with all members of an industry, issues substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented,

the production of competitive unpatented products suppressed, a class of distributors squeezed out, resale prices of another class of distributors fixed, and prices of unpatented products stabilized, such conduct constitutes a violation of the Sherman Act; and in such circumstances the doctrine of the case of *United States v. General Electric Co.*, 272 U. S. 476, has no application.

9. The *General Electric* case, *supra*, applies only in a situation where the patentee licenses a single licensee to make and sell the patented device with a provision that the single licensee's sale price shall be fixed by the patentee, and where there is not involved a conspiracy to restrain or monopolize trade.

10. Two or more competing patents may not be combined for the purpose or with the effect of obtaining price control on the products manufactured under any of them. The merging of patents in order to obtain the benefits of price fixing under the patents restrains trade in violation of the Sherman Act in the same way as would the fixing of prices between producers of nonpatentable goods. Therefore, when USG took over the starch patents from Universal, combined them with the Roos foam applications, and then licensed the industry under both with price control, such conduct constituted a violation of Sections 1 and 2 of the Sherman Act.

11. The defendants, being erstwhile competitors who together manufactured all the gypsum board produced for sale in interstate commerce in the Eastern area, 12598 entered into common price-fixing patent license agreements for the purpose of organizing the industry and stabilizing prices, and their conduct in so doing constituted a combination and conspiracy to restrain and monopolize trade and commerce in violation of Sections 1 and 2 of the Sherman Act.

12. The defendants, in violation of Sections 1 and 2 of the Sherman Act, in carrying out in the Eastern area the continuing combination and conspiracy referred to in Conclusion of Law No. 11, have:

- (a) concertedly raised and fixed at arbitrary and non-competitive levels the prices of gypsum board manufactured and sold by them;
- (b) concertedly standardized gypsum board manufactured by them and its methods of production and distribution;
- (c) concertedly attempted to raise and stabilize the general level of prices for plaster and miscellaneous gypsum products;

- (d) concertedlly eliminated jobbers from the gypsum board distributive system;
 - (e) concertedlly attempted to fix the resale prices and the terms and conditions of sales of board sold by manufacturing distributors;
 - (f) concertedlly excluded Cardiff Gypsum Company from access to a source of supply of board.
13. The defendants, in violation of Sections 1 and 2 of the Sherman Act, in carrying out the concerted activities referred to in subparagraphs (a) to (f) inclusive of Conclusion of Law No. 12, have:
- (a) observed and followed the prices and terms and conditions of sale prescribed by USG in price bulletins issued under various licenses relating to board, metallized board and perforated lath;
 - (b) held licensee meetings to work out the details of the distributive system which had been established generally under the license agreements;
 - (c) organized Board Survey or participated in the policing activities which that agency conducted to assure uniform industry practices;
- 12599 (d) limited the manufacture of board to uniform methods and by producing for sale uniform kinds of board; and
- (e) inspected or permitted to be inspected the books and records of the licensees.
14. The license agreements relating to board, metallized board, and perforated lath are illegal contracts in restraint of trade or commerce among the several states in violation of Section 1 of the Sherman Act.
15. The defendants have monopolized the production, sale, and distribution of gypsum board in the Eastern area in violation of Section 2 of the Sherman Act.
16. The defendants have suppressed competition in the gypsum industry in the Eastern area at the price, quality, and service levels in violation of Section 1 of the Sherman Act.
17. There is a reasonable likelihood that the illegal restraints and monopolization of trade practiced by the defendants will be continued or resumed unless the defendants are restrained from continuing or resuming the illegal practices. Therefore, an injunction will issue which will effectively pry open to competition a market that has been closed by defendants' illegal restraints.
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12600 United States District Court for the
District of Columbia

No. 8017 Civil Action

UNITED STATES OF AMERICA, PLAINTIFF,
vs.

UNITED STATES GYPSUM CO. *et al*, DEFENDANTS.

I, HARRY M. HULL, Clerk of The United States District Court for the District of Columbia, do hereby certify the annexed to be a true and correct copy of the original Proposed Decree, filed April 19, 1950 as it appears of record in the Clerk's Office of said Court in the above-entitled cause.

IN TESTIMONY WHEREOF, I hereunto subscribed my name and affix the seal of said Court, at the City of Washington, this 19th day of April, 1950.

HARRY M. HULL, *Clerk*,
By H. N. Graves,
Deputy Clerk.

(Seal)

12601 In the United States District Court
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,
v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CETO-TEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; HENRY J. HARTLEY; and FREDERICK TOMKINS, DEFENDANTS.

Proposed Decree

This cause having duly come on to be heard on motion of plaintiff for a summary judgment, filed at the request of the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, as amended, or in the alternative, for such further proceedings as the Court should order, based upon the existing state of the record; and the Court having considered the pleadings in the action and all proceedings heretofore had herein, including all exhibits and testimony of

witnesses, the admissions by counsel for the defendants, the proffer of proof submitted pursuant to the Court's request of June 8, 1948, by all defendants, 12602 except National and Ebsary which defendants did not submit any proffer of proof; having read and considered the briefs submitted on behalf of the parties hereto; having heard oral argument; having found that there is no genuine issue as to any material fact except as to the proper inferences to be drawn from the exhibits and uncontradicted testimony of witnesses who testified at the trial of this cause, and also except as to the scope and extent of the relief to be granted; and the Court having made findings of fact and conclusions of law wherein the defendants have been found to have violated Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C.A. Sec. 1 and 2;

Now, therefore, upon motion of plaintiff by its attorneys for relief in accordance with the prayer of the complaint, and the defendants having severally appeared by counsel,

IT IS ORDERED, ADJUDGED, AND DECREED:

I

That the Court has jurisdiction of the subject matter herein and of all the parties hereto; that the complaint states a cause of action against defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Anti-trust Act, and the acts amendatory thereof and supplemental thereto.

II

That for the purposes of this decree:

1. "Said defendants" shall mean all the corporate defendants and the individuals named in the caption of this decree.

12603 2. "Corporate defendants" shall mean all the defendants mentioned in the caption of this decree except the named individuals and Texas Cement Plaster Company.

3. "Gypsum products" shall mean those products used primarily in the building construction industry made from gypsum, including but not limited to, plaster, plasterboard, lath, wallboard (the latter three may be ordinary, perforated, or metallized), special surfaced gypsum board, sheathing, liner board, block, tile, and Keene's cement.

4. "Gypsum board" shall mean all the gypsum products enumerated in subparagraph 3 except plaster, block, tile, and Keene's cement.

5. "Patents" and "patent applications" shall mean United States Letters Patent and applications for United States Letters Patent, respectively, and continuations, continuations-in-part, renewals, reissues, divisions, and extensions thereof.

III

That said defendants, and each of them, have contracted, combined, and conspired to restrain trade and commerce in gypsum products and have monopolized, attempted to monopolize, combined and conspired to monopolize trade and commerce in gypsum board among the several States, in violation of Sections 1 and 2 of the Sherman Antitrust Act.

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IV

That the provisions of this decree applicable to any defendant shall apply to such defendant and to each of its officers, directors, agents, attorneys, servants and employees, and to each of its successors and assigns, and to all persons acting or claiming to act, under, through or for such defendant.

V.

That the said defendants, in connection with the offering for sale, sale, and distribution of gypsum products in interstate commerce, be and each of them hereby is jointly and severally enjoined and restrained from entering into, continuing, cooperating in, or carrying out any planned common course of action, undertaking, agreement, combination, or conspiracy between any two or more of said defendants, or between any one or more of said defendants and others not parties hereto, to do or perform any of the following things:

1. To fix, establish, maintain, control, or make uniform the prices, terms and conditions of sale at which gypsum products shall be sold or resold;

2. To fix, establish, maintain, or make uniform the kinds, types, or varieties of gypsum products manufactured or sold; or the methods of manufacturing, selling, packaging, shipping, delivering, or distributing gypsum products, for the purpose or with the effect of

aiding or assisting in arriving at or maintaining uniform prices, terms and conditions of sale of such products;

12605 3. To refrain from the manufacture, sale, or distribution of any kind, type, or variety of gypsum products; or the method of manufacturing, selling, packaging, shipping, delivering, or distributing gypsum products, for the purpose or with the effect of aiding or assisting in arriving at or maintaining uniform prices, terms and conditions of sale of such products;

4. To refrain from selling to or distributing gypsum products to any purchaser or any class of purchasers of such products;

5. To use, determine, agree upon, or adhere to any system of quoting or selling gypsum products at prices calculated or determined pursuant to or in accordance with the basing-point delivered-price system; or quoting or selling gypsum products pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for gypsum products at points of quotation or sale or to particular purchasers by defendants using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more of the defendants against any other defendant;

6. To use, compile, circulate, or exchange information concerning common carrier transportation charges or other freight or delivery charges used or to be used as a factor in computing the price of gypsum products;

7. To use, determine, agree upon, or adhere to any basis for the selection or classification of purchasers of gypsum products;

12606 8. To use, determine, agree upon, or adhere to any methods, means, conditions, practices, or delivery points or areas used or to be used in selling, shipping or distributing gypsum products;

9. To directly or indirectly police, investigate, check, or inquire into the prices, quantities, terms and conditions of any offer to sell, sale or resale of gypsum products for the purpose or with the effect of aiding or assisting in maintaining uniform prices, terms and conditions of sale of such products;

10. To hold meetings, gatherings, or conferences for the purpose or with the effect of aiding or assisting in maintaining uniform prices, terms and conditions of sale of gypsum products.

VI

1. That defendant United States Gypsum Company is hereby ordered and directed to grant to each applicant therefor, but only insofar as it has the right to do so, a non-exclusive license to make, use and vend under any, some, or all patents and patent applications now or hereafter owned or controlled by it relating to gypsum products, their processes or methods of manufacture, or their uses.

2. That defendant United States Gypsum Company is hereby enjoined and restrained from making any sale or other disposition of any of said patents or patent applications which deprives it of the power or authority to grant such licenses, unless it sells, transfers or assigns such patents and patent applications and requires, as a condition of such sale, transfer or assignment, that the purchaser, transferee or assignee shall observe the requirements of Sections VI and XI of this decree and the purchaser, transferee or assignee shall file with this 12607 Court, with notice thereof to the Attorney General, prior to consummation of said transaction, an undertaking to be bound by the provisions of Sections VI and XI of this decree.

3. That defendant United States Gypsum Company is hereby enjoined and restrained from including any restriction or condition whatsoever in any license or sublicense granted by it pursuant to the provisions of this section except that: (a) the license may be non-transferable; (b) a reasonable non-discriminatory royalty may be charged, provided, however, that the royalty so charged may not be imposed upon or measured by patent-free products, processes or uses; (c) reasonable provision may be made for the cancellation of the license upon failure of the licensee to pay the royalties as hereinabove provided; (d) the license must provide that the licensee may cancel the licenses at any time by giving 30 days' notice in writing to the licensor; and (e) the license must provide that the licensee shall immediately have the benefit of any more favorable terms granted other licensees. Without limiting the generality of anything hereinbefore provided, the license may not contain any provision authorizing, allowing, or permitting defendant United States Gypsum Company to inspect the books and records of any licensee.

4. That upon receipt of written request for a license under the provisions of this section, defendant United

States Gypsum Company shall advise the applicant of the royalty which it deems reasonable for the patents or patent applications to which the request pertains. If the parties are unable to agree upon a reasonable royalty within 60 days from the date of such request for the license was received by United States Gypsum Company, the applicant therefor may forthwith apply to this Court for the determination of a reasonable royalty, and United States Gypsum Company shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General with the right to be heard thereon. In such proceeding, the burden of proof shall be on United States Gypsum Company to establish the reasonableness of the royalty requested by it, and the reasonable royalty rates, if any, determined by the Court shall apply to the applicant and all other licensees under the same or substantially the same patents or patent applications. Pending the completion of negotiations between the parties or any proceeding before this Court, the applicant shall have the right to make, use and vend under the patents or patent applications to which the application pertains without payment of royalty or other compensation, but subject to the provisions of subsection 5 of this section.

5. That where the applicant has the right to make, use and vend under patents or patent applications under subsection 4 of this section, United States Gypsum Company may apply to this Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty, if any. If the Court fixes such interim royalty rate, United States Gypsum Company shall then issue and the applicant shall accept a license, or, as the case may be, a sublicense, providing for the periodic payment of royalties at such interim rate from the date of the filing of such application by the applicant. If the applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action shall be grounds for the dismissal of his application. Where an interim license or sublicense has been issued pursuant to his subsection, reasonable royalty rates, if any, as finally determined by the Court shall be retroactive for the applicant and for other licensees paying a higher royalty rate under the same or substantially the same patents or patent applications to the date the applicant filed his application with the Court.

C. Nothing herein shall prevent the plaintiff or any applicant from attacking, in the aforesaid proceedings or in any other proceedings, the validity or scope of any patents or patent applications nor shall this decree be construed as importing any validity or value to any of said patents or patent applications.

VII

1. That each and all of the patent license agreements, contracts, assignments, and other arrangements relating to board, metallized board, and perforated lath which have been heretofore entered into between United States Gypsum Company and each of the other corporate defendants or their predecessors and with defendant Samuel M. Gloyd, are hereby cancelled; such cancellation to be effective upon the execution by United States Gypsum Company and each of the other defendants of a uniform license agreement pursuant to Section VI hereof, or upon the expiration of sixty days from the date of the entry of this decree, whichever is earlier.

2. That from and after the effective date of the cancellation provided for in subsection 1 of this section, each defendant is hereby enjoined and restrained from the further performance of any such agreement, contract, assignment or other arrangements, and from adopting, adhering to or entering into any future substantially similar agreement, contract, assignment or other arrangements.

VIII

That each of said corporate defendants and defendant Samuel M. Gloyd is hereby enjoined and restrained, directly or indirectly, from conditioning the sale of any kind, type or variety of gypsum products to any purchaser thereof upon the procurement by said purchaser of any other kind, type or variety of gypsum or other products whatsoever from any of said defendants or from any other designated source.

IX

That each of said corporate defendants and defendant Samuel M. Gloyd is hereby directed to sell gypsum board which is then being or about to be offered or shall have been offered by any such defendant in the United States, to any other manufacturer of gypsum products at non-discriminatory prices, terms and conditions; provided that:

1. Gypsum board is available for such purposes;
2. Any such defendant shall not be required to sell unless it is offering, about to offer, or has offered the type, kind or variety of gypsum board within the United States and at any time any defendant may discontinue the business of selling gypsum board;
3. Such sale is not required to be made without cash payment or security to any manufacturer of gypsum products not having proper credit rating; and
4. The sale price may differ from time to time as to different types or kinds of gypsum board so long as the sale price at any one time is uniform to all buyers alike as to each type or kind of gypsum board.

X

1. That each of said corporate defendants and defendant Samuel M. Gloyd, while engaged in the manufacture and sale of gypsum products, is hereby enjoined and restrained from acquiring, purchasing, acquiring and holding or acquiring and controlling, directly or indirectly, or through agents, representatives, or nominees, the business or assets or capital stock or bonds of any other defendant herein.

2. That each of said corporate defendants and defendant Samuel M. Gloyd, while engaged in the manufacture and sale of gypsum products, is hereby enjoined and restrained from acquiring, purchasing, acquiring and holding or acquiring and controlling, directly or indirectly, or through agents, representatives or nominees, the business or assets or any measure of control over the business of any competing corporation, firm, or individual so engaged, unless and until any such acquisition is approved by this Court, after reasonable notice to the Attorney General with an opportunity to be heard thereon; provided, however, that this subsection of this section shall not prevent any of the corporate defendants or defendant Samuel M. Gloyd from acquiring, purchasing, acquiring and holding or acquiring and controlling the business or assets or capital stock or bonds of any corporation, firm, or individual engaged in business solely outside the territorial limits of the United States and its possessions.

3. That the defendants Sewell L. Avery, Oliver M. Knode, Melvin H. Baker, Henry J. Hartley, Frederick G. Ebsary, and Frederick Tomkins and each of them, while officers or directors of any of the corporate defendants engaged in

the manufacture or sale of gypsum products, is hereby enjoined and restrained from acquiring, purchasing, acquiring and holding or acquiring and controlling, directly or indirectly, or through agents, representatives, or nominees, any measure of control through ownership of stock or bonds or otherwise of any corporation, firm, or individual so engaged competing with the corporation with which he is officially connected unless any such acquisition is approved by the Court, after reasonable notice to the Attorney General with an opportunity to be heard thereon; provided, however, that this subsection of this section shall not prevent any of the above-named individuals from acquiring, purchasing, acquiring and holding or acquiring and controlling the business or assets or capital stock or bonds of any corporation, firm, or individual engaged in business solely outside the territorial limits of the United States and its possessions.

XI

That the Attorney General of the United States or his proper representative shall, for the purpose of securing compliance with this decree, be permitted (1) access, during the office hours of the said defendants, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under control of said defendants, relating to any matters contained in this decree, (2) subject to any legally recognized privilege, without restraint or interference from the defendants, to interview officers or employees of the defendants, who may have counsel present, regarding any such matters; provided, however, that information obtained by the means permitted in this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings, for the purpose of securing compliance with this decree in 12613 which the United States is a party or as otherwise required by law.

XII

That judgment is entered against the said defendants for all costs to be taxed in this proceeding.

XIII

Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the

parties to this decree, or any other person, firm or corporation that may hereafter become bound, in whole or in part, thereby to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of this decree, and (2) for the enforcement of compliance therewith and the punishment of violations thereof.

.....

12614 In the Supreme Court of the United States
 (Title Omitted)

Statement of Defendant-Appellees, United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, With Respect to Plaintiff-Appellant's Motion to Supplement Record—Filed April 24, 1950

1. Defendant-Appellees, United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, do not object to the addition of Plaintiff-Appellant's Proposed Decree to the record on appeal.

2. Defendant-Appellees oppose the addition of Plaintiff-Appellant's Proposed Findings and Conclusions to the record on appeal for the following reasons:

(a) Such Proposed Findings and Conclusions are argumentative and brief-like in character and do not form a proper part of a record on appeal.

(b) No assignment of error with respect to these Proposed Findings and Conclusions has been made by Plaintiff-Appellant.

12615 3. If the Plaintiff-Appellant is permitted to add its Proposed Findings and Conclusions to the record on appeal, these Defendant-Appellees move the Court for leave to add to the record on appeal their Memorandum in Opposition thereto, certified copy of which is attached to this statement.

BRUCE BROMLEY
 ALBERT R. CONNELLY
 HUGH LYNCH, JR.
*Attorneys for United States
 Gypsum Company, Sewell L.
 Avery, Oliver M. Knode*

April 24, 1950.

12616 United States District Court for the
District of Columbia
No. 8017 Civil Action

UNITED STATES OF AMERICA, PLAINTIFF
vs.

UNITED STATES GYPSUM COMPANY, *et al.*, DEFENDANTS

I, HARRY M. HULL, Clerk of THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, do hereby certify the annexed to me a true and correct copy of the original Memorandum in Opposition to Plaintiff's Proposed Decree, Findings and Conclusions, filed March 4, 1949, as it appears of record in the Clerk's Office of said Court in the above-entitled cause.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, this 24th day of April, 1950.

(SEAL)

HARRY M. HULL, *Clerk*
By H. N. GRAVES,
Deputy Clerk.

12617 In the District Court of the United States
For the District of Columbia
(File Endorsement Omitted)

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF
v.

UNITED STATES GYPSUM COMPANY, ET AL., DEFENDANTS

*Memorandum in Opposition to Plaintiff's Proposed Decree,
Findings and Conclusions—Filed March 4, 1949*

(File Endorsement Omitted)

12620 This memorandum is submitted by the defendants in opposition to the proposed decree, findings of fact and conclusions of law submitted by plaintiff upon the motion for summary judgment herein. Defendants object generally to such proposed decree, findings and conclusions upon the ground that they go far beyond the scope of the issues determined by this Court upon plaintiff's motion for summary judgment. In addition, such proposed decree, findings and conclusions are specifically objectionable upon grounds hereinafter stated.

I

IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, THIS COURT DECIDED THE ISSUE PRESENTED BY THE MOTION AND DID NOT PURPORT TO DETERMINE IN PLAINTIFF'S FAVOR ALL ISSUES PRESENTED BY THE PLEADINGS.

Plaintiff's proposed findings, conclusions and decree purport to cover the charges made in the complaint, including the allegations under the general headings of THE FORMATION OF THE COMBINATION, THE OPERATION OF THE COMBINATION, and THE EFFECT OF THE COMBINATION. It therefore becomes necessary at the outset to consider the nature of the conspiracy specifically charged in the complaint and the nature of the conspiracy which plaintiff, on its motion for summary judgment, contended was conclusively established on the present record.

The complaint charges that the defendants are parties to contracts and actively engaged in a continuing combination and conspiracy to restrain trade and commerce in gypsum board, plaster and miscellaneous gypsum products 12621 and to monopolize such trade and commerce, among the several states in the eastern area of the United States in violation of Sections 1 and 2 of the Sherman Anti-trust Act (Compl., Pars. 44, 45) by concertedly (a) raising and fixing at arbitrary and non-competitive levels the prices of gypsum board, (b) standardizing gypsum board and its method of production, (c) raising, maintaining and stabilizing the general level of prices for plaster and miscellaneous gypsum products, (d) refraining from distributing gypsum board, plaster, and miscellaneous gypsum products through jobbers, and (e) inducing and coercing manufacturing distributors to resell gypsum board at prices fixed by defendants; that the combination was entered into and carried out in part under the guise of numerous license agreements under patents owned by the defendant USG; and that to give color of legality to the combination the defendants concertedly agreed among themselves to enter into and did enter into said license agreements which were not *bona fide* but entered into for the illegal purposes described in paragraphs 44 and 45 (Compl., Par. 46).

With respect to THE FORMATION OF THE COMBINATION, the complaint alleges that the combination was formed between September, 1925 and early 1930, having its roots in litigation which made the manufacture of closed-edge board impossible without infringement of USG's patents (Compl.

Pars. 47-54; R. 11-13); that Avery of USG, Blagden of Beaver, and Griswold of American agreed among themselves (between September 1925 and July 1926) to induce the industry to enter into licenses with USG to effectuate long-term price stabilization of the gypsum board industry. Blagden and Griswold to act as liaison between USG and the industry for that purpose (Compl. Pars. 55-63; R. 13-15); that between July and September, 1926 Beaver and Universal accepted USG's proposed license with price control, and Griswold and Blagden continued to agitate at meetings and conferences for the execution of licenses by the rest of the industry, as a result of which and the persuasions of Blagden, Griswold and Avery, Atlantic and Texas entered into licenses in March and April, 1927 (Compl. Pars. 64-66; R. 15-16); and that from April, 1927, to May, 1929, during a price-war in the industry, Holland of Universal agreed with Avery to promote the licensing plan at meetings held in late 1928 and early 1929, and Avery, to induce other companies to join, assured them that USG, upon expiration of the Utzman patent in August, 1929, would take steps to control prices thereafter under color of some patent (Compl. Pars. 67-75; R. 16-18).

The complaint in this connection further alleges that in May, 1929, National, Certain-teed, Ebsary and Niagara entered into licenses in reliance upon Avery's assurance of further price control and pursuant to an agreement among themselves and USG to do so; that in addition USG and its licensees agreed that the manufacture of open-edge 12622 and second-grade closed-edge board would be discontinued, that USG would advance and stabilize prices for patented board, that all companies would increase their prices for plaster and miscellaneous gypsum products as board prices increased, and that USG would continue price control after expiration of the Utzman patent through use of other patents (Compl. Pars. 76-77; R. 18-19); that from June to October, 1929, pursuant to its agreement for continued price control and to give color of legality thereto, USG offered licenses to its licensees under its foam or bubble patent applications; that pursuant to agreements between USG and its licensees to grant and take licenses thereunder, USG acquired the Haggerty and Hite starch patents from Universal and executed licenses covering the foam process and the starch patents (Compl. Pars. 78-84; R. 19-20); that the October and November 1929 license agreements were entered into between USG and

its licensees, and American and Kelley, under the bubble invention and starch patents, pursuant to said agreements and for the purpose of continuing price control; and that by virtue of those agreements USG, by 1930, was authorized to control all board prices and all companies except Texas (until 1937 when it also took a license) were obliged to manufacture a uniform, standardized board (Compl. Pars. 85-88; R. 20-22).

With respect to THE OPERATION OF THE COMBINATION, and THE EFFECT OF THE COMBINATION, the complaint alleges in considerable detail that pursuant to the agreements as aforesaid prices of board were raised, stabilized and maintained at high, arbitrary and noncompetitive levels; that USG and its licensees concertedly standardized production of board; that after meetings and discussions they concertedly eliminated jobbers through the elimination of the jobbers' discount; that they concertedly controlled prices and methods of distributing unpatented gypsum board, plaster and miscellaneous gypsum products; that they concertedly controlled the prices at which manufacturing distributors resold board; that for purposes of extending and strengthening the operation of the basic license agreements, the metallized board and the perforated lath licenses were entered into; and that by means of the combination the defendants have controlled and dominated the manufacture and distribution of gypsum board, plaster and miscellaneous gypsum products in the Eastern Area, have eliminated certain factors from the distribution system, and have maintained uniform and non-competitive prices in board, plaster and miscellaneous gypsum products higher than those prevailing when the combination was formed in 1929 (Compl. Par. 90-123; R. 23-32).

This Court, in an exhaustive review of the law and the facts, concluded at the close of the Government's case that the conspiracy as charged in the complaint had not been proved and that the patent license contracts and price bulletins were legal within the doctrine of the *General Electric* case, 272 U. S. 476 (D. C. Op., R. 3934-4131). Accordingly, at the close of the Government's case it ordered the complaint dismissed.

Following the reversal of that judgment by the Supreme Court, plaintiff moved for summary judgment in its favor on the ground that adherence by the defendants, in an entire industry, to the price provisions of patent licenses, with knowledge of the adherence thereto by the others, constituted concert of action in violation of the Sherman Act.

Thus plaintiff contended that under the Supreme Court's opinion, the *General Electric* case did not authorize a patentee to issue to all competitors in an entire industry a plurality of licenses containing price-fixing clauses and that such plurality of licenses and adherence to the price provisions thereof constituted concert of action in restraint of trade despite the assumed legality of each separate patent license, under the doctrine that lawful acts may become unlawful when taken in concert (Pltff.'s Sum. J. Br., 24-5).

Such concert of action being the gist of the offense, counsel urged that plaintiff had only to establish its existence, without any issue as to a material fact, and that all of the other abuses normally constituting a violation of the Sherman Act could be laid aside. In answer to the Court's question, counsel said that for purposes of the motion it was not essential to show those violations; that if price control alone were shown there was a case; and that it was the Government's intention to ask for summary judgment on that basis (Tr. 7814-15).

In this connection counsel stated the essential elements he had to establish, namely, whether the defendants, erstwhile competitors, had combined to fix prices, and whether that is so clear that there was no genuine issue as to any material fact. He pointed out that there was no question that they were former competitors; that they all took out licenses which contained a price-fixing agreement; and that all that remained was to show concert of action by showing that at some time they learned there were other competitors in the industry all guiding themselves by USG bulletins (Tr. 7822, 7824-45). None of the licensee defendants ever denied that it took a patent license contract and adhered to the minimum price bulletins issued by USG, the licensor defendant.

Finally, to establish its position, plaintiff asserted it had shown: (1) that the patent license contracts admittedly were executed by the several defendants and the price bulletins issued thereunder were adhered to by them (Tr. 7824-5), (2) that at the meeting of May 23, 1929, USG offered a license under the foam application to any of the licensees who desired it, which licenses were subsequently accepted by the licensees and signed in November 1929 (Tr. 7834), (3) that defendants admitted the formation by USG in 1932 of Board Survey and the subsequent policing by it of the board prices (Tr. 7831-32), (4) that it was admitted that at the meeting of October 17, 1932, the defendants learned they

were all operating under similar licenses and price bulletins (R. 7832), (5) that it was admitted that all of the licenses provided for price control (Tr. 7834-5), and (6) that counsel for the defendants admitted before the Supreme Court that because of the most-favored nation clause in the patent licenses each of the licensees must have known that it was participating in a general plan (Tr. 7836-7).

Counsel argued from this that there was a clear-cut case of the defendants; erstwhile competitors, going into a plan to license the entire industry and fix prices, each eventually knowing that the others were in the plan; that there was a combination or conspiracy under Section 1 of the Sherman Act without the necessity of showing any intent; and that the Supreme Court of the United States had so held (Tr. 7835-7).

Upon the same showing, plaintiff contended that there was no genuine issue as to any material fact concerning the existence of a monopoly under Section 2 of the Sherman Act (Tr. 7848-51, 7854).

In the light of the allegations of the complaint and the proceedings heretofore had in this case, the charges of conspiracy here involved may be classified as follows:

(1) The charge that defendants, competitors in an entire industry, by severally entering into individually lawful patent license agreements with price limitation provisions adhered to by them with knowledge of the adherence of the others, acted in concert to restrain trade in gypsum board (sometimes, for convenience, referred to herein as "combination by plurality of licenses"); and

(2) The charge that defendants entered into a plan or scheme to fix prices and control the production and distribution of gypsum board and other gypsum products, in part by the execution of patent licenses, adopted to disguise defendants' illegal purposes and in part by agreements relating to unpatented products (as more fully set forth in the complaint), and have thereby conspired to restrain trade in gypsum board (sometimes for convenience, referred to herein as "conspiracy extrinsic to the plurality of licenses").

The Court, upon its construction of the Supreme Court's opinion and the showing made by plaintiff of the admissions with respect to the execution of the patent license contracts with price limitation adhered to by the licensees, as above stated, concluded that the defendants had acted in concert

to restrain trade and commerce in patented gypsum board among the several states in the eastern territory of the United States in violation of the Sherman Anti-Trust Act. Thus, the Court determined the motion for summary judgment upon the ground that the defendants had become parties to a "combination by plurality of licenses." It did not decide that defendants had become parties to a "conspiracy extrinsic to the plurality of licenses."

12625

II

PLAINTIFF'S PROPOSED DECREE, FINDINGS AND CONCLUSIONS ARE IMPROPER IN THEIR ENTIRETY

The principles of law applicable to framing an equity decree are clear. Because the purpose of a decree is remedial, not punitive, a court must take care that a "decree be no more drastic than the facts of the case and the law demand," *United States v. E. I. du Pont de Nemours & Co.*, 188 Fed. 127, 153 (C. C. Del., 1911), and bear a "fair relation to the issue which was heard and determined," *N. L. R. B. v. Swift & Co.*, 108 F. (2d) 988, 990 (C. C. A. 7th, 1940). This is not to say that a decree can deal only with the exact violations found to have been committed, but a court "cannot issue a general injunction against all possible breaches of the law," *Swift & Co. v. United States*, 196 U. S. 375, 396 (1905). A court is bound to frame its decree so as to suppress only "the unlawful practices and to take such reasonable measures as would preclude their revival," *Ethyl Gasoline Corporation v. United States*, 309 U. S. 436, 461 (1940).

The necessity and propriety of any particular provision can be determined only by examining the precise nature and extent of the violation of law found to exist, its consequences, and the purposes and intent of the violators. An injunction appropriate in such flagrant cases of continuing, broad and purposeful conspiracies as those found to have existed in other cases such as *United States v. Hartford-Empire*, 323 U. S. 386 (1945), would obviously be inappropriate and punitive in this case.

(a) The Proposed Decree

Upon the plaintiff's theory of the case it is entitled to a decree within the scope of the determination made on the motion for summary judgment, i.e., that the defendants, competitors in an entire industry, had acted in concert to restrain trade and commerce under the patent license contracts with price limitation adhered to by them with knowl-

edge of the adherence of the others. It does not follow, upon the present state of the record, that because the Court held that the price provisions of the patent license contracts were illegal, all the charges outside the scope of that determination were established, as plaintiff now seems to assume or take for granted. Alleged agreements in restraint of trade and commerce in gypsum products outside the scope of the determination, including, for example, those with respect to raising and maintaining the prices of plaster and miscellaneous gypsum products, eliminating jobbers of such products and fixing the resale prices of manufacturing distributors, were in controversy between the parties, as shown by the pleadings and offers of proof.

12626 The Court, in deciding the motion for summary judgment, in face of the denials in the answers, the failure of proof by plaintiff, the offers of proof to the contrary, and finally the findings of fact by the court upon the same record that the plaintiff had failed to prove the charges, did not hold that all those charges were established by plaintiff upon the present state of the record. The judgment upon the motion included those charges within the scope of the determination, which involved the price control of patented gypsum board manufactured and sold under the patent license contracts and the price bulletins. In fact, the Court, in disposing of the case upon the motion for summary judgment, necessarily must have concluded that those other charges were not established by the plaintiff, otherwise it would not have denied defendants the right to interpose their defense thereto. Furthermore, the Court, as shown, originally found that those charges had not been proved and it should not now upon the same record be asked to find that they were. (Orig. FF. 57, 73, 80-84, 86, 94-97, 103-117, R. 4155, 4158-4160, 4162-4167; D. C. Op., R. 4065-72, 4079-4100).

Plaintiff's proposed decree not only provides for relief with respect to violations charged in the complaint outside the scope of the determination upon the motion, but violations not even charged in the complaint. It contains a blanket holding of a violation of Sections 1 and 2 of the Sherman Anti-trust Act and an injunction with respect to the manufacture, sale and distribution of every product in the gypsum industry, covering numerous items; among them prices, setting, packaging, shipping, delivery and distribution, classification of purchasers, exchange of information and meetings, applying to all gypsum products, alleged violations charged in the complaint which were not

proved, and alleged violations not even charged in the complaint. It also contains many punitive provisions not at all warranted by the circumstances of the case or within the intent of the Court in directing plaintiff to submit a final decree on the motion for summary judgment.

A final decree, as stated above, which grants relief within the scope of the determination upon the motion as determined by the Court will afford plaintiff ample protection. A decree finding that the defendants, by adhering to the price limitation provisions of the patent license contracts, with knowledge of the adherence of the others, acted in concert to restrain trade and commerce and in violation of the Sherman Anti-trust Act, and adjudging the price provisions of the patent license contracts unlawful, and directing the cancellation of the licenses, with an adequate injunction against further violations, is sufficient.

Without waiving our objection to the entry of any decree in favor of plaintiff, we attach hereto, as Exhibit A, a form of decree which, in our view, affords all the relief to which plaintiff may reasonably be held to be entitled under 12627 the decision of this Court upon the motion for summary judgment.

(b) The Proposed Findings and Conclusions

Plaintiff's motion for summary judgment in its favor was filed pursuant to Rule 56 of the Federal Rules of Civil Procedure. Even prior to the 1948 amendment of the Federal Rules of Civil Procedure, it had been uniformly held by the courts that findings of fact and conclusions of law were unnecessary on the decision of motions under Rule 56. *Lindsey v. Leary*, 149 F. (2d) 899, 902 (C. C. A. 9th, 1945); *Burman v. Lenkin Construction Co.*, 149 F. (2d) 827, 828 (App. D. C., 1945); *Huffman v. Norfolk & Western Ry.*, 71 F. Supp. 564, 565 (W. D. Va., 1947). And the 1948 amendments to the Rules added the following specific provision to Rule 52(a):

"Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)." Rule 41(b) has, of course, no application here. Accordingly, we submit that there is no occasion for the court to make any findings of fact and conclusions of law in this case.

If the Court concludes, nevertheless, to make findings of fact, then we submit that findings naming the defendants, defining the nature of the business in interstate commerce in the eastern area, describing the process of manufacture of gypsum board, the history of the development of the pat-

ents and the licensing thereunder, the acceptance of the licenses by the defendants and the issuance of price bulletins thereunder by licensor and the adherence thereto by the defendant licensees with knowledge of the adherence of the others, the organization of Board Survey, Inc. and its activities in investigating performance under the licenses, together with the admissions relied upon by the plaintiff upon its motion for summary judgment to show knowledge among the defendants and concert of action, are ample to support any decree which may properly be entered herein. These constitute the very findings of fact which the Court made with respect to the main issue in the case when it dismissed the complaint (FF. 1-21, 31, 60; R. 4132-44, 4148; 4155). For the convenience of the Court, in the event that it should conclude to make separate findings of fact and conclusions of law, we annex hereto, as Exhibit B, all the findings and conclusions which we believe to be proper in the light of the determination made by this Court upon the motion for summary judgment.

The voluminous proposed findings and conclusions submitted by plaintiff disregard entirely the scope of the determination upon the motion for summary judgment and cover practically every charge made in the complaint, whether or not there is any supporting evidence in the record, 12628 and, in addition thereto, many charges not even made in the complaint. In Part IV of this memorandum, we shall set forth, in detail, our specific objections to such proposed findings and conclusions. There are, however, general objections applicable to such findings and conclusions which, in our view, justify and require their rejection *in toto* without any necessity for detailed analysis of each separate proposal:

(i) They are not true findings of fact amply supported by the evidence. In the main they do not purport to be ultimate facts, but consist, rather, of selected bits of evidence, or inferences which plaintiff seeks to draw from selected portions of the evidence, put together in the form of a prejudicial, incomplete narrative—for the most part taken from allegations of the complaint and the argumentative statements in plaintiff's brief in the Supreme Court (hereinafter called the Government's brief)—in an effort to create an inference that defendants have been found to have been parties to a "conspiracy extrinsic to the plurality of licenses" as charged in the complaint. In so doing, plaintiff has completely ignored substantial evidence clearly negating its contentions, and has found it necessary to rely upon

speculation, upon hearsay evidence, and upon prejudicial statements to make it appear that transactions extending over a period of more than ten years were all part of a planned conspiracy from the beginning. Thus the proposed findings violate fundamental principles of truth, as set forth in this Court's opinion (D. C. Op. R. 4012).

(ii) Such proposed "findings" are wholly outside the scope of the issues decided by this Court on the motion for summary judgment. This Court, proceeding under Rule 56 of the Federal Rules of Civil Procedure—which does not permit the granting of summary judgment when there is any genuine issue as to a material fact—has construed the opinion of the Supreme Court to mean that a plurality of patent licenses with price limitation adhered to by each of the licensees with knowledge of adherence thereto by others is illegal *per se*. Defendants do not deny the existence of such multiple licenses in the gypsum industry. Therefore, in the light of its construction of the Supreme Court's opinion, this Court held it could properly grant summary judgment against the defendants as parties to a "combination by plurality of licenses" without the necessity for a resumption of the trial of the issue as to whether they were parties to a "conspiracy extrinsic to the plurality of licenses".

It cannot be doubted, however, that if plaintiff were to succeed in its effort to have this Court make findings upon issues extraneous to those actually decided, plaintiff would thereby be placed in a position to argue in the Supreme Court that even if this Court's construction of the Supreme Court's opinion should be rejected, plaintiff would nevertheless be entitled to judgment in its favor upon the theory that this Court had found a "conspiracy 12629 extrinsic to the plurality of licenses"—a result manifestly not intended by this Court in granting plaintiff's motion for summary judgment.

(iii) Such proposed "findings" are inconsistent and directly in conflict with the findings of fact heretofore made by this Court upon the same record. Detailed references to this Court's opinion and prior findings will be made in Part IV of this memorandum in connection with our discussion of specific objections to the proposed findings; at this point, it is sufficient to note that in its findings of fact Nos. 29-38, 57, and 85 (R. 4148-4150, 4155, 4160), this Court found that the license agreements were executed at arm's length; that they were *bona fide* agreements intended to bind each party to the terms made therein, and not sham

agreements executed to disguise illegal purposes; that they were entered into in good faith in reliance upon the decision of the Supreme Court in the *General Electric* case (272 U. S. 476) and *Bement v. National Harrow Company* (186 U. S. 70); that throughout all of its negotiations with the various companies USG insisted upon the same terms in its license agreements, and was willing to grant a license to any company that was willing to accept those terms; that the companies which became licensees did so because they desired to settle or avoid litigation and to obtain the right to use USG's patents, considering it a business necessity to be able to do so; that although there was discussion among the prospective licensees and with USG of the terms of the proposed licenses and of the advantages of signing them, nevertheless the decision to take a license was reached by each of the companies independently; that the licensees took their respective licenses without regard to what other companies did; and that the license agreements were not executed with intent to gain objectives beyond the limits of a patent monopoly.

As members of this Court have already stated (Tr. 7946, 7950), this Court is not required to find the facts to be otherwise than it found before; under its construction of the Supreme Court's opinion it is merely required to conclude, as a matter of law, on the facts that it found before, that the defendants have violated the Sherman Act—i. e., that the existence of a plurality of licenses with price limitation adhered to by each of the licensees with knowledge of the adherence thereto by other licensees is illegal *per se*.

(iv) Moreover, it would be improper for this Court, in granting summary judgment, to include in its findings, the plaintiff's version of facts which are in dispute, and as to which the defendants have been refused opportunity to adduce evidence. It is abundantly clear from the defendants' Offer of Proof that the defendants deny that there was any "conspiracy extrinsic to the plurality of licenses" (Offers of Proof 1-5, 15, 17, 18, 47-49, 62): Thus, the defendants have offered to prove that there was not
 12630 any agreement or understanding between USG and the other defendants or any of them that there would be industry-wide licensing, or that USG would organize or stabilize the industry; that in offering and issuing licenses to the other defendants, USG acted independently and not by virtue of any agreement or understanding with the other defendants or any of them; that at all times

USG was willing to license any one manufacturer without regard to whether or not a license was taken by any other manufacturer or manufacturers; that at all times the sole interest of the licensor in offering and issuing license agreements was to secure to itself the full benefits of its patents, and not to enter into a plan or scheme to stabilize the gypsum industry; that the companies which became licensees did so because they desired to settle or avoid litigation and to obtain the right to use USG's patents, considering it a business necessity to do so; that Blagden, Griswold and Holland (upon whose actions and statements the Government heavily relies in its proposed findings) were not authorized to represent USG or Avery in negotiations with other manufacturers of gypsum board, and that any efforts which they made to induce other manufacturers to become licensees of USG were independent efforts of their own, and were made without any authorization from USG; and that the provisions in the license agreements were inserted for the purpose of protecting the licensor and the licensees with respect to those matters and things common to entering into such contractual relations.

(v) In addition, such proposed findings are based in large part upon hearsay statements contained in the declarations which the Supreme Court held were admissible upon the theory that the industry-wide license agreements and the bulletins were sufficient to establish a *prima facie* case. Whatever bearing the declarations might have had if the case had been tried upon the controverted charges that there was a "conspiracy extrinsic to the plurality of licenses" outside the scope of the determination on the motion, they have no bearing upon the motion for summary judgment. Likewise, they have no bearing upon the final decree which is to be entered based upon those admissions of defendants which this Court found conclusively established the ultimate fact that the defendants acted in concert in a "combination by plurality of licenses".

Not only do these declarations lie unexplained in the record by any evidence of the defendants, but the Supreme Court indicated clearly that they required explanation, as is illustrated by the statement that there was no proof that Avery approved the Blagden memorandum and the comment with respect to Holland's letter to Haggerty that Holland's interpretation of Avery's views was incorrect (333 U. S. at 376). The several statements made therein, upon the present state of the record, whether taken alone or in

conjunction with the other evidence in the case, may not be taken as ultimate facts or even used as a basis for the determination of an ultimate fact within the rules governing the principles of proof as stated in the opinion of this Court (D. C. Op., R. 4012-16). Without any opportunity on the part of the defendants to explain them because of the Court's present decision, these declarations and the statements made therein may not properly be used as a basis for any finding of fact. They were offered by plaintiff principally to prove the early negotiations for the license contracts for the purpose of attempting to show a "conspiracy extrinsic to the plurality of licenses", a wholly immaterial issue on the question decided by the court upon the motion. Furthermore, this Court has already found that whether taken alone or in conjunction with other related items, they fail to prove that the defendants were associated in a "conspiracy extrinsic to the plurality of licenses", and the Court should not now be asked to find the contrary on this motion.

Plaintiff's proposed conclusions of law similarly disregard entirely the scope of the determination upon the motion for summary judgment, and are in that and many other respects objectionable. Many of them are not actually conclusions of law, but rather are apparently attempts to obtain improper findings from the Court under the guise of conclusions of law (*i. e.* Conclusions 7 through 13, 15, 16 and 17). Others attempt to inject legal conclusions which are in no way applicable to this case (*i. e.* Conclusions 3, 5, 6, 7, 9 and 10). Some of the proposed conclusions contain inaccurate statements of the rules they purport to cover (*i. e.*, Conclusions 2, 5 and 6), and others have attempted to obtain sweeping conclusions regarding illegal monopolies under Section 2 of the Sherman Act (*i. e.*, Conclusions 4, 11, 12, 13 and 15).

In both its proposed findings and its proposed conclusions, plaintiff contends that defendants, by adhering to the minimum price provisions of the patent licenses, acted in concert to monopolize trade in gypsum board in violation of Section 2 of the Sherman Antitrust Act. It also contends that a monopoly was established wholly apart from the question of acting in concert. Defendants contend that neither proposition is sound and that plaintiff is entitled to no relief upon the monopoly charge.

In the *American Tobacco* case, 328 U. S. 781, it was held that in a conspiracy to monopolize, the group must have the power to exclude competition to a substantial extent and

the intention and purpose to exercise it. The *Griffiths* case, 334 U. S. 100, reasserted the rule that where the acts are insufficient to produce the result which the law seeks to prevent, an intent to bring it to pass is necessary.

In adhering to the minimum price provisions of the license agreements there is no indication of any understanding or agreement among the defendants to exclude competition, nor of any intention or purpose to exercise any such power. Adherence to the price provisions under the concert of action theory could amount to no more than an agreement to restrain trade by fixing the prices of patented board in violation of Section 1 of the Act.

The contention that there was a monopoly apart from the question of acting in concert is necessarily based upon the theory that aside from the licenses defendants entered into an agreement to exclude competition, with the power and ability to do so and the intent and purpose to exercise it. This raises a controversial issue which was denied in the answers and upon which defendants were entitled to be heard. The question could not have been determined upon the motion for summary judgment.

The charge is made that the defendants have monopolized the production, sale and distribution of gypsum board, in violation of Section 2 of the Act. This is based upon charges such as standardization and restraints on distribution of board, all of which were denied and are in controversy between the parties. Nor does plaintiff's evidence, which at best could only be taken as *prima facie* upon the present state of the record, establish any such charge or show that the group had the power to exclude competition or the intention to exercise any such power. In fact this Court, in its prior findings, found that the bulletins dealt only with price; that there was no such exclusion of competition or intention to do so; and that there was no agreement among the defendants aside from the patent licenses.

That board was standardized or its distribution restrained, as contended by plaintiff, are not only controversial questions upon which defendants are entitled to be heard, but even upon plaintiff's theory could not establish an agreement among the defendants to exclude within the meaning of Section 2 of the Act or show that defendants as a group had the power or intent to do so. That Cardiff could not buy patented board has no foundation in the record for there is no such charge in the complaint nor any evidence to sustain it. The contention that certain companies have been purchased by other defendant companies

has nothing to do with the case. No charge was made in the complaint with respect to these purchases, nor is there any evidence of anything unlawful with respect thereto.

Accepting all that plaintiff claims, there is nothing which upon the motion for summary judgment could establish the conspiracy among the defendants to exclude competition to a substantial extent as required, or that there was any specific intent to do so.

We submit that, upon the motion for summary judgment, plaintiff has failed to show any conspiracy to monopolize or that defendants have monopolized, the production, sale or distribution of gypsum board, in violation of Section 2 of the Sherman Act.

While the objections herein discussed are sufficient in themselves to vitiate in their entirety plaintiff's proposed findings and conclusions, they are by no means the only objections thereto. Such proposed findings and conclusions are filled with inaccuracies, unsubstantiated hearsay evidence, matters not included within the scope of the complaint, incomplete statements of fact, arguments, innuendoes, and unfair and prejudicial conclusions. Our specific objections thereto are set forth in Part IV of this Memorandum.

III

THE SPECIFIC PROVISIONS OF PLAINTIFF'S PROPOSED DECREE ARE PUNITIVE AND INAPPROPRIATE:

For the convenience of the Court, we shall here discuss, in order, each of the Sections of the plaintiff's proposed decree to which specific objection is made:

SEC. II

Section II of plaintiff's proposed decree, consisting of sub-paragraphs 1 to 5 covers definitions designed to carry out many of the objectionable provisions to which we take exception and should be read along with the objections pointed out below with respect to each separate section of the decree.

The term "gypsum products" is defined as meaning "those products used primarily in the building construction industry made from gypsum, including but not limited to" numerous specified products. Thus the plaintiff seeks to include products not included in the complaint, which was limited to gypsum board and plaster and miscellaneous gypsum products, the latter being defined in the plaintiff's

Bill of Particulars as "gypsum block, gypsum tile, and Keene's cement" (R. 158).

"Patents" and "patent applications" are defined so as to include any letters patent heretofore or hereafter issued and any applications or letters patent heretofore or hereafter made. As so defined, plaintiff's proposed decree would have the effect of providing for forfeiture of rights in all of defendant United States Gypsum Company's patents and patent applications—past, present and future.

SEC. III

Section III of plaintiff's proposed decree provides that defendants have contracted, combined and conspired to restrain trade and commerce in gypsum products and have monopolized, attempted to monopolize, combined and conspired to monopolize trade and commerce in gypsum board among the several states, in violation of Sections 1 and 2 of the Sherman Act.

As to Section 1 of the Sherman Act, this provision not only includes trade and commerce in all gypsum products among the several states but fails to set forth in 12634 what respects defendants restrained trade and commerce within the meaning of Section 1 of the Act. The scope of the final determination upon the motion for summary judgment covered only concert of action to restrain trade and commerce in patented gypsum board in the eastern territory of the United States under the plurality of patent license contracts described in the complaint. In lieu of Section III as suggested by plaintiff, it should be provided that the defendants, by adhering to the minimum price provisions of the patent license contracts, with knowledge of the adherence of the others, acted in concert to restrain trade and commerce in the manufacture and sale of patented gypsum board among the several states in the eastern territory thereof, in violation of Section 1 of the Sherman Act.

As to Section 2 of the Sherman Act, this provision includes trade and commerce in all gypsum board among the several states and fails to set forth in what respect the defendants monopolized or attempted to monopolize within the meaning of Section 2 of the Act. Only the sale of patented board in the eastern territory of the United States was involved, and the provision should be so limited. Although defendant USG had a monopoly under the patent laws, there was not, as we have heretofore shown, any monopoly or intent to monopolize within the meaning of Section 2 of the Sherman Act.

SEC. IV

Section IV of plaintiff's proposed decree provides that the provisions applicable to any defendant shall apply to such defendant and to each of its officers, directors, agents, etc. According to the definitions in Section II of the decree, the word "defendants" means all the corporate defendants and the individuals. We think the decree should apply to the defendant companies and their officers, directors, agents, servants and employees, but not to the individual defendants as such.

Upon the motion for summary judgment, concert of action was shown only with respect to the defendant companies and not the individuals. Furthermore, evidence in the record with respect to the individual defendants referred only to the negotiations for each separate license contract, the legality of which is assumed upon the present state of the record. Plaintiff, as shown, failed to establish a conspiracy to enter into the patent license contracts, nor is there evidence in the record of any deliberate intention of any of the individual defendants to violate the law.

It is inappropriate in a case like this to enjoin the individual defendants who are not parties to the patent license contracts but simply parties defendant in the case because they were officers of corporate defendants. We submit it is sufficient to enjoin the companies and their officers, directors, agents, servants and employees.

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SEC. V

Section V of plaintiff's proposed decree provides that the defendants, in connection with the offering for sale, sale and distribution of gypsum products, be enjoined from entering into, continuing or carrying out any planned common course of action, undertaking or agreement to do or perform any of the things set forth in the numbered subparagraphs 1 to 10 thereof.

In the first place, plaintiff did not establish upon its motion for summary judgment that there was any planned common course of action, undertaking or agreement in the sale and distribution of gypsum products, nor did the Court, in directing summary judgment, determine anything more than that there came a time when the defendants admittedly, with knowledge of the adherence of the others, adhered to the price limitation provisions of the patent license contracts and thereby acted in concert to restrain trade and

commerce in patented gypsum board, under the newly announced doctrine of the Supreme Court. This section proceeds upon the theory (1) that defendants were parties to a "conspiracy extrinsic to the plurality of licenses" and (2) that it included all products in the gypsum industry, which on both grounds is beyond the scope of the determination on the motion for summary judgment. It is directly in conflict with the prior findings of the court upon the same record that there was no such "conspiracy extrinsic to the plurality of licenses" and that plaintiff failed to establish its charges that defendants so restrained trade and commerce in the manufacture and sale of gypsum products.

In the second place, the numbered sub-paragraphs 1 to 10 cover not only every product in the industry but every activity in the sale and distribution of gypsum products wholly outside anything determined on the motion for summary judgment. Plaintiff seeks thereby to enjoin defendants from entering into or carrying out any planned common course of action, undertaking or agreement (1) to fix or make uniform prices, terms and conditions of sale of gypsum products of any kind, (2) to fix or make uniform gypsum products of any type or variety or the methods of manufacturing, selling, packaging, shipping, delivering or distributing the same (3) to refrain from the manufacture, sale or distribution of gypsum products of any type or variety or the method of manufacturing, selling, packaging, shipping, delivering or distributing the same (4) to refrain from selling or distributing gypsum products of any kind to any purchaser or class of purchasers, (5) to use or adhere to any basing point or delivered price system (6) to use, compile, circulate or exchange any information concerning transportation or delivery charges, (7) to use or adhere to any basis for selection or classification of purchasers, (8) to use or adhere to any methods, means, conditions, practices, delivery points or areas, (9) to
12636 police, investigate or inquire into prices, quantities, terms and conditions of sale or resale, and (10) to hold meetings or conferences for the purpose of aiding or assisting in maintaining uniform prices, terms and conditions of sale of gypsum products of any kind.

These provisions cover sales, production and distribution as to every possible activity with respect to every product in the industry, whether or not it is the subject matter of any charge in the complaint, is supported by any substantial evidence, or is within the scope of the final determina-

tion on the motion for summary judgment. They are also objectionable in that they assume the determination of every issue of fact in the case against the defendants notwithstanding the denials in the answers, the offers of proof and the prior findings of this Court upon the same record that they were not established by any substantial evidence.

The extent to which plaintiff would go is illustrated by sub-paragraph 5 of this Section V, wherein it seeks to enjoin defendants from agreeing upon or adhering to any system of quoting or selling gypsum products at prices calculated pursuant to or in accordance with a basing-point delivered price system or any other plan or system which results in identical price quotations or prices for gypsum products or which prevents purchasers from finding any advantage in price in dealing with one or more of the defendants against any other defendant. In short, the Government in this proposal presents the issue in the *Cement* case which took years to litigate and seeks a basing-point injunction in the gypsum industry upon an issue not in the case, with no evidence to support it, and wholly outside the scope of the determination made upon the motion for summary judgment. Furthermore, the evidence of plaintiff on the charge that the defendants conspired to fix the prices of gypsum products and otherwise restrain trade in the industry, does not support such a provision in the decree, as this Court found upon the same record at the close of plaintiff's case. In view of the controversy with respect to the whole issue of any agreement or understanding to fix prices or in any other manner control or regulate the sale or distribution of gypsum products, the denials in the answers, the offers of proof, the failure of plaintiff's proof, and finally the findings of this Court that no such agreement or understanding, the provision is without any support in the present state of the record upon the motion for summary judgment.

The provisions of said Section V, sub-paragraphs 1-10 thereof, do not aim to protect the public interest with respect to the holding of this Court that the defendants had acted in concert to restrain trade and commerce under the plurality of patent licenses, despite the assumed legality of each separate patent license contract, but on the contrary seek to enjoin the defendants against every imaginable wrong which might be committed under the Sherman Act and place the industry under a wholly unworkable decree.

12637 The public interest will be protected in this case by canceling the patent license contracts and enjoining the defendant companies from exercising or adhering to any price limitation therein or in the bulletins issued under them, or from entering into or maintaining any plurality of patent license contracts with price limitation in the gypsum board industry to fix, maintain or stabilize prices on patented gypsum board or the terms and conditions of sale thereof.

SEC. VI

Section VI of plaintiff's proposed decree provides (1) that defendant USG be ordered to grant a non-exclusive license under some or all patents and applications now or hereafter owned or controlled by it relating to gypsum products, (2) that it be enjoined from disposing of any of its patents or patent applications unless the assignee agrees to observe the requirements of Sections VI and XI of the decree, (3) that it be enjoined from including any restriction or condition in any license except that the license may be non-transferable; a reasonable royalty may be charged but not measured by patent-free products; provision may be made for cancelation for failure to pay royalties; license must provide for cancelation by licensee on 30 days' notice; license must provide for benefit of any more favorable terms granted other licensees; and no provision may be made for inspection of books and records by USG, (4) that applicants may apply to the Court for determination of royalties and USG shall have the burden of establishing the reasonableness of royalties requested by it, (5) that the Court may fix an interim royalty pending final determination and royalty rates finally determined shall become retroactive to date of application, and (6) that nothing in any such license shall prevent plaintiff or applicant from attacking validity or scope of patents.

The Government originally founded its charges upon an agreement or understanding among the defendants to raise and fix at arbitrary and non-competitive levels the prices of gypsum board and plaster and other miscellaneous gypsum products, carried out in part under the guise of numerous license agreements merely to give color of legality to the combination, which plaintiff wholly failed to prove as shown by the prior finding of this Court. The motion for summary judgment was decided upon the new theory, that adherence by the defendants, in an entire industry, to the

minimum price provisions of the patent license contracts, with knowledge of the adherence of the others, violates the Sherman Act. There is even a serious question if any such charge was made in the 127-page complaint filed by the Government where it spelled out in the greatest detail the charges made against the defendants. What is more important, there is no evidence in the case of any deliberate intent of the defendants to violate the Sherman Act, but on

the contrary the record shows that they believed, 12638 and were so advised by their counsel, that they had a right to enter into the patent license contracts and adhere to the price provisions therein. The *General Electric* case was so construed by the courts and the bar for more than twenty years until the decisions of the Supreme Court in this and the *Line Material* case repudiating or limiting the plainly declared doctrine of that case.

If the Supreme Court held that a mere plurality of such licenses industry-wide violated the Act, then plaintiff, upon its theory, is entitled to a decree consistent with the theory upon which the motion was made and granted, but it is not entitled to any punitive provisions, such as the provisions found in proposed Section VI. There is no foundation in this case for compulsory licensing to all applicants under all patents and patent applications now or hereafter owned by USG relating to gypsum products, as provided in sub-paragraph 1 of this Section, nor for the provisions of sub-paragraphs 2 and 3 fastening a restriction to the sale of the patents to perpetuate an unwarranted control and to prevent USG from making any license with any conditions except those outlined therein, which provisions would strip the company of its property rights in all of its patents. These punitive provisions are not only unnecessary but they are unwarranted in a case like this. The cancellation of the presently existing license contracts, as suggested in our form of decree, Exhibit A, will satisfy the public interest and should satisfy the Attorney General, who represents that interest.

The construction of sub-paragraph 6 of this Section is doubtful, but if the Government means that a licensee may question the validity for scope of the patents covered by his license, we take exception to the suggestion, since it has no place in the decree in a case like this.

Defendant licensees relied upon the doctrine of the *General Electric* case, the same as the defendant licensor, and by the holding on the motion for summary judgment should

not be deprived of their rights to manufacture and sell under the patents of USG included in their present patent license contracts. Their rights should be recognized in the decree by giving the licensees the right to take a non-exclusive license to make, use and sell patented gypsum plasterboard, lath and wallboard embodying the inventions of the same patents under which they are now licensed, at reasonable royalties to be agreed upon between the parties.

SEC. VII

Section VII of plaintiff's proposed decree provides for the cancellation of all patent license agreements, contracts, assignments and other arrangements relating to board, metallized board and perforated lath which have ever been entered into between USG and the other defendant companies and an injunction in equally broad terms. This is about the only provision of the proposed decree 12639 which recognizes that the scope of the determination upon the motion for summary judgment is the illegality of the plurality of patent license contracts, but at the same time it goes wholly outside the scope of the determination by seeking the cancellation of every contract, assignment and arrangement relating to patented board. No such provision is warranted within the scope of the final determination made in the case. If a decree is to be entered, a proper provision would be to declare the minimum price provisions of the patent license contracts illegal, cancel each of the contracts, and enjoin further performance thereunder.

SEC. VIII

Section VIII of plaintiff's proposed decree provides that the defendants shall be enjoined from conditioning the sale of any gypsum product upon the procurement by the purchaser of any other gypsum product or other products whatsoever from the defendants or from any other designated source. This provision is not only outside the scope of the determination upon the motion for summary judgment but is outside of any charge made in the complaint, nor is it warranted by any evidence in the case.

SEC. IX

Section IX of plaintiff's proposed decree provides that the defendants shall sell gypsum board to any other manufacturer of gypsum products at non-discriminatory prices, terms and conditions of sale, provided the board is available

and the purchaser has proper credit rating, unless security or cash is furnished. This provision is not only outside the scope of the determination made upon the motion for summary judgment, but it is not covered by any charge made in the complaint or supported by any evidence in the case.

The evidence is clear that no manufacturer was ever denied the right to buy patented gypsum board. The Cardiff testimony was received, by the express ruling of the Court, alone upon the issue of whether the prices of plaster had been fixed by the defendants, an issue which this Court held was not established by plaintiff. Furthermore, the evidence in this respect was very unsatisfactory, as the Court will recall, and even if it had not been limited to the issue above mentioned, it is insufficient to support such a decree upon the present state of the record, in face of the denials in the answers, the offers of proof and the prior findings of the court. With the cancellation of the license contracts and termination of all price limitation provisions, including requirement of consent to sell, there is no reason for such a provision as this.

The veiled meaning of the provisions, whether intended or not, is disclosed by such phrases as: "gypsum board," that is, patented or unpatented; "is then being or about to be offered or shall have been offered," that is, offered at any time to anybody; "available for such purposes," that is, merely for sale if offered to another, although plaintiff would have us believe it meant if the board was available; "shall not be required to sell unless it is offering, about to offer or has offered the type," that is, not to manufacturers but ever offered at any time to anybody in the United States; "sale is not required to be made without cash payment or security to any manufacturer * * * not having credit rating," that is, cash is not required but defendants must determine the credit of the customer at their peril; and "so long as the sale price at any one time is uniform to all buyers," that is, no matter what kind of trade, competition, or other conditions there are which naturally would affect the price.

SEC. X

Section X of plaintiff's proposed decree, by sub-paragraphs 1 and 2 thereof, provides that the defendants be enjoined from acquiring, purchasing, acquiring and holding, or acquiring and controlling at any time the business or assets or capital stock or bonds of any other defendant, or the business or assets or any measure of control over the busi-

ness of any competing company so engaged without the approval of the court. These provisions are not only outside the scope of the determination made upon the motion for summary judgment, but are outside any charge made in the complaint, any issue between the parties or any evidence in the record. There is not the slightest foundation for claiming in this case that purchases by the defendants of any gypsum properties were in any way improper or made as the result of an agreement or understanding among the defendants, directly or indirectly, that they would be acquired.

Sub-paragraph 3 of this Section X provides that each of the individual defendants, while officers or directors of any of the defendant companies, be enjoined from acquiring, purchasing, acquiring and holding, or acquiring and controlling any measure of control through ownership of stock or bonds or otherwise of any competing company with the corporation of which he is an official unless the acquisition is approved by the Court. Here again is a provision which not only goes outside the scope of the determination made upon the motion for summary judgment but outside any charge made in the complaint, any issue between the parties or any evidence in the record. There is not the slightest foundation for any such provision in the decree.

SEC. XI

Section XI of plaintiff's proposed decree provides for (1) access by the Attorney General to all books and records of defendants relating to matters in the decree, and (2) 12641 power by the Attorney General to interview officers and employees regarding any such matters. Such a provision is not necessary in a case like this for the protection of any public interest and, like practically all other provisions of the decree, goes outside the scope of the determination upon the motion for summary judgment, since it covers records and inquiries with respect to issues of fact not established by plaintiff, not included in the complaint and in conflict with prior findings of the Court. The simple cancellation of the contracts is all that is necessary to support any proper decree in the case.

SEC. XII

Section XII of plaintiff's proposed decree seeks to tax all costs of the proceeding against defendants. The case was tried by the Government upon the theory that defendants had entered into a plan or agreement to fix prices and otherwise restrain trade and commerce in gypsum products in

part by use of license contracts to give color of legality to the combination. In this plaintiff failed to establish its case. It now relies upon a new theory advanced by the Supreme Court, which was not foreseen either by the defendants and their counsel or the Government and its counsel. In fact, there is a serious question if it is even alleged in the complaint. Upon the theory which plaintiff now adopts upon its motion for summary judgment, no evidence was necessary to sustain its motion except those facts which the defendants never even denied. Furthermore, there was no actual or deliberate intent on the part of any of the defendants to violate the law, as shown under "Sec. VI" hereinabove.

We submit that it is unjust under these circumstances to tax all the costs against the defendants. The Government should bear a part of the taxable costs of the case.

SEC. XIII

Section XIII of plaintiff's proposed decree provides for the retention by the Court of jurisdiction for the entry of such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of the decree, and (2) for the enforcement of compliance therewith and the punishment of violations thereof. The form of this reservation is inappropriate in a case like this.

We suggest that jurisdiction be retained for the purpose of enabling any of the parties to the decree to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of the decree, for the modification or termination of any of the provisions thereof, and for the enforcement thereof.

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IV

THE SPECIFIC PROVISIONS OF PLAINTIFF'S PROPOSED FINDINGS AND CONCLUSIONS ARE IMPROPER

We have heretofore stated (*supra*, Part II(b) of this Memorandum) our general objections applicable to plaintiff's proposed findings and conclusions in their entirety. Such objections (including the objection with respect to hearsay statements contained in declarations) are specifically applicable to substantially each and every such proposed finding and conclusion. The following are additional specific objections to such findings and conclusions:

A. FINDINGS

(1) PROPOSED FINDINGS 1-10 (THE DEFENDANTS)

Proposed findings 3 to 19 are copied verbatim from the Government's brief before the Supreme Court (pp. 9-12). The subject is dealt with in this Court's opinion (R. 3934-35) and in this Court's prior findings (F. 1, 2, 21; R. 4132-4133, 4144).

Proposed finding 3 deletes from this Court's prior finding on the same subject the reference to the bill of particulars limiting the term "miscellaneous gypsum products" to gypsum block, gypsum tile and Keene's cement (FF. 3, R. 4133). The purpose of this omission becomes obvious upon inspection of the Government's proposed decree which is designed to cover every product in the gypsum industry.

Proposed finding 4 states that USG was incorporated to effect a merger of 35 producers, processors and distributors of gypsum products. This allegation was made in the complaint, but denied in the answer, and no evidence with respect to it was offered or received at the trial (R. 6.270). Proposed finding 4 then states in the second sentence that during the last twenty years USG acquired the gypsum plants of eight additional producers, including Niagara. The complaint charged that USG, during the last twenty years, had acquired the gypsum plants of ten other producers, including Niagara (R. 6). This was denied in USG's answer. It was averred, however, that during the twenty years preceding the filing of the complaint it had acquired the plants of eight producers including the acquisition of Niagara in 1929, but that it had not acquired the plant or plants of any other producer of gypsum board since that acquisition (R. 271). No evidence was introduced with respect to these allegations.

Proposed findings 5, 6, 7 and 9 contain statements as to the acquisition by National, Certain-teed, Celotex and Newark of other companies. This Court dealt adequately with the description of the defendants in the opening paragraph of its opinion and in its findings heretofore made (D. C. Op. R. 3934; FF. 2, R. 4132). As to the 12643 charge of monopoly, the complaint makes no such charge with respect to the purchase of competitors (Compl. 44, 45, 46; R. 9-11; D. C. Op., R. 4124-4125). To the extent that the acquisition by defendants of other companies was material as an historical recital of the facts, the subject was adequately covered by this Court in its findings heretofore made (FF. 15, R. 4141).

(2) PROPOSED FINDINGS 11-15 (THE GYPSUM INDUSTRY)

Proposed findings 11 to 15 are copied verbatim from the Government's brief (pp. 13-15). The subject is dealt with in this Court's opinion and in its findings heretofore made (D. C. Op., R. 3935-36, 3947, 3981; FF. 4, 5, 21; R. 4133, 4144).

The description of gypsum and the manufacturing process contained in proposed findings 11 to 15 is taken from paragraphs 12 and 26 of the complaint (R. 4, 5), in spite of the fact that such description is qualified in many respects in the answer of USG (R. 266, 268) and that defendant USG has had no opportunity to offer evidence in support of the qualifications alleged in its answer. This Court's findings with respect to this subject matter (FF. 4 and 5, R. 4133) were based upon a consideration of the evidence received. They cover with entire adequacy the nature of the product, the nature of the mineral, the manufacturing process and its development and advance, and the contributions thereto made by the patents owned by defendant USG. No assignment of error was made by the Government to either Finding 4 or 5 referred to above. Nothing has occurred since that time to call for any modification or expansion thereof.

Proposed finding 13 illustrates the impropriety of the proposals of the Government. Its opening sentence reads: "The basic patents on gypsum board have long since expired." This finding is intended as support for the Government's charge of *non bona fides* as alleged in the complaint and is proposed in face of the fact that this Court, in Finding of Fact No. 24, gave careful consideration to the principal patents covered by the license agreements, including the so-called Roos Patents (no one of which incidentally has expired), and found that they were product patents covering fundamental developments in the gypsum board manufacturing industry (R. 4145). And the Government's proposal is made in complete disregard of the fact that defendants in their offer of proof 61 have offered to prove that the principal patents of USG under which the license agreements were issued were basic patents and of such scope as to have great commercial value.

(3) PROPOSED FINDINGS 16-25 (THE CONSPIRACY—DURING THE YEARS 1925-26)

Proposed findings 16 to 25 are taken from the Government's brief (pp. 16-31), substantial portions being 12644 verbatim. These matters are dealt with in this

Court's opinion (R. 3936-37, 4030-39, 4052, 4065, 4102-3, 4109-12, 4115) and in its Findings 5 8, 29-34, 36-38 heretofore made (R. 4133-36, 4148-50).

While the Government has adopted some of the language used by this Court in Findings 5-8, it has edited that language so as to treat the subject matter thereof in a prejudicial manner without regard to the fact that such treatment is not supported by the record. For example, this Court in its Finding No. 5 referred to the Utzman Patent as "issued in 1912 to USG on application of an inventor-employee named Clarence W. Utzman", but the Government in proposed finding 16 refers to that patent as issued "upon the application of Clarence W. Utzman, and assigned by him to USG", without stating that Utzman was an employee of USG. By treating the fact in its brief in the same manner as it was originally alleged in the complaint (Compl. R. 11; Br. p. 16), plaintiff led the Supreme Court into this same error (333 U. S. 364, 369).

Again, in Finding No. 6, this Court stated that Bestwall, in the course of its litigation with USG, had been acquired by Beaver; but in its proposed finding 17 that statement is changed by the Government to read "Bestwall had been acquired by Beaver, which then became the second largest manufacturer of gypsum board in the United States, and both were manufacturing a board with semi-enclosed edges." This change is not supported by the record.

Another illustration of an important alteration which the Government has made in this Court's prior finding appears in proposed finding 17 regarding the USG litigation with Bestwall and Beaver, wherein the Government has deleted that part of this Court's Finding No. 6 that the decisions in the USG-Bestwall-Beaver litigation "made the manufacture of closed-edge board by a competitor of USG impossible without infringement of USG's patent rights" (R. 4134).

Similarly, in proposed finding 22 the Government states that Blagden, in an attempt to settle Beaver's litigation with USG, offered to transfer to USG all of Beaver's patents. That finding is proposed despite the facts that the complaint makes no charge of illegality in respect of the transfer of Beaver's patents to USG, and that during the trial of this case the Government specifically denied that it was making any charge of illegality in respect thereof (R. 817, 3911-13).

This impropriety is carried into proposed finding 24 which purports to analyze the USG-Beaver contract. Proposed finding 24 is in the language of the complaint (Par. 64; R. 15) except that it incorporates a sentence which was inserted in the Government's brief injecting the issue of the transfer of the Beaver patents to USG (Br. p. 23), a point not raised in the complaint and waived at the time of the trial (R. 15; 817). Furthermore, in describing the price limitation provision in the contract, proposed finding 24 fails to state that it was limited to board embodying 12645 the disclosure of the Utzman product patent and extended to no other patent, and in describing the royalties payable it omits the significant prefatory language that the royalty was "for the privilege of manufacturing, using and selling gypsum board under the patents", both of which points were properly covered in this Court's Finding 8 (R. 4136).

To suggest the substitution of proposed finding 24 for this Court's careful analysis of the 1926-1927 licenses contained in its Finding No. 8 is wholly indefensible.

Proposed finding 20 of the Government is a prejudicial recitation of portions of a memorandum of Blagden to Avery dated December 12, 1925 (Ex. 185). This memorandum was carefully considered in the opinion of this Court and it was there pointed out that there was no evidence that the subject matter of the memorandum was ever discussed by Blagden or Avery or that it was ever seen or its contents discussed by any other person in the industry (R. 4110). This conclusion is confirmed by the fact that the Supreme Court recognized that there was no proof that Avery ever approved Blagden's memorandum (333 U. S. at p. 373).

Moreover, defendants offered to prove (par. 14) that Blagden's memorandum was not accepted or approved by Avery and was never at any time discussed by him with Blagden during or after their negotiations; that Avery never entered into any agreement or understanding with Blagden with respect to anything contained in such memorandum and particularly never agreed with him or anyone else that Beaver or Blagden would agree to use its or his best efforts to induce other members of the industry to accept similar licenses from USG, and that Avery did not authorize it or him to do so. Since the defendants have not been given an opportunity to introduce their evidence in this connection, and since the facts are, therefore, disputed and

undetermined, it is obviously improper for the Government to request this court to find its version of the facts.

Proposed findings 21, 22, 23 and 25 state the Government's version of certain statements and actions of Blagden and Griswold. No attention is paid to the finding of this Court wherein it is stated (without assignment of error by the Government) that the Avery-Blagden discussions involved the settlement of the Beaver-USG litigation, and that any interest of Griswold in the settlement of litigation in the gypsum industry was motivated by concern for his own company and for the proposed merger which his company was promoting (FF. 37; R. 4150). Neither is there any attention paid to defendants' offer of proof (pars. 15 and 17), wherein defendants offered to prove that neither Blagden nor Griswold was authorized to represent USG or Avery in negotiations with other manufacturers of gypsum board, and that any efforts that they made to induce other manufacturers to accept licenses from USG were made independently, and without any authorization of Avery or USG.

12646 Proposed finding 21 is largely made up of prejudicial recitations of portions of declarations, principally intra-company communications between Griswold and McCrady. Proposed Finding 22 is an inaccurate statement of portions of Blagden's testimony. Proposed findings 23 and 25 consist of prejudicial recitations taken largely from declarations, principally Griswold letters. They are inconsistent and in conflict with this Court's prior findings and are wholly improper (FF. 5, 6, 29-34, 37; R. 4133-34, 4148-50).

(4) PROPOSED FINDINGS 26-28 (DURING THE YEAR 1927)

Proposed findings 26-28, inclusive, are a summarization of the Government's contentions regarding events in the year 1927 which were fully dealt with in the opinion of this Court (R. 4038-9, 4110 and 4112), and fully covered in the findings of fact of this Court numbered 24, 33, 34, 36, 37 and 63 (R. 4145-6, 4148-50, 4156).

Proposed findings 26, 27 and 28 are largely made up of prejudicial recitations of portions of declarations and testimony, principally letters and testimony of Griswold. They are directly in conflict with the prior findings of this Court made upon the same record (FF. 29-40; R. 4148-51).

This Court has held that Beaver settled its law suit and took a license without regard to the other companies; that

Blagden testified that he had nothing to do with the taking of licenses by Universal in September, 1926, Atlantic in March, 1927, and Texas in April, 1927; and that these were the only licenses executed while he remained in the gypsum industry (R. 4110). The Court has also held that Griswold had nothing to do with Texas and Atlantic taking their licenses in 1927 (R. 4112). In this the Court is amply supported by the record (R. 713, 719). This being so, it is entirely improper for the Government to request this Court to find that throughout the year 1927 both Blagden and Griswold continued "the campaign to induce non-licensee board manufacturers to become licensees of USG" (proposed finding 26) and that, despite their efforts, only two additional patent license agreements were entered into in that year, *i. e.*, Atlantic and Texas (proposed finding 27). This is particularly so when it is realized that the purpose of requesting the Court to make such a finding is to get a basis of support for the allegation in the complaint (par. 58) that Avery, Blagden and Griswold agreed among themselves that efforts should be made to induce the industry to enter into license agreements with USG, having for their purpose the long term price stabilization of the board industry, and that Blagden and Griswold agreed to act as liaison between USG and the industry for this purpose. That charge in the complaint was denied by the answers and there was a complete failure of proof, as this Court has found. As the opinion shows, the conclusions reached by the Court in this connection were made on the assumption that all of the 12647 declarations received in evidence were binding upon all the defendants (R. 4101).

Moreover, defendants offered to prove (pars. 14, 15, 17 and 21-25) that there was no understanding between Messrs. Avery and Blagden and that neither Blagden nor Griswold was at any time authorized to represent USG or Avery in negotiations with other gypsum board manufacturers, and that the negotiations for the Atlantic, Texas and Certain-teed licenses were conducted independently with each company.

(5) PROPOSED FINDINGS 29-35 (DURING THE YEAR 1928)

Proposed findings 29 to 35, inclusive, are a summarization of the Government's views regarding events in the year 1928 which are fully dealt with in the opinion of this Court (R. 3938, 4043-4 and 4113-5) and fully covered in the findings of this Court numbered 9, 37 and 40 (R. 4136-4137, 4150, 4151).

Finally the defendants made offers of proof (pars. 4, 15-17, 18, 24, 25, 29) with relation to the events of 1928.

Throughout this group of findings proposed by the Government there are many instances in which conclusions drawn by it from the evidence are unfairly stated.

Proposed finding No. 29 illustrates this, where this sentence appears:

"During this period Brown felt confident that he could make open-edge board and sell it in competition with USG."

The evidence clearly established that, while at one time Brown so expressed himself in an intra-company memorandum (Ex. 212), this feeling was contrary to the views of others in the Certain-teed organization and, as a result of this and other considerations, Brown himself later became convinced that it was necessary for Certain-teed to make the closed-edge product (R. 1222-3, 1398-9, 1475, 1490, 1446-7, 1455-6). Another example is the statement contained in proposed finding 29 to the effect that

"Brown understood that USG's determination to gather in a monopoly, if possible, led them to risk everything for such domination because of the big results possible, if they were successful. On March 14, 1928, Certain-teed filed an answer to the suit couched in those terms."

This Court made a finding with respect to that answer and reached the conclusion that the exhibits with respect to it (Exs. 324 and 212) were at most equivocal in meaning and that it could with equal reasonableness be inferred that, before signing the license, Certain-teed had reached the conclusion that its pleading was erroneous and therefore felt free to accept the license agreement offered (FF. 40, R. 4151).

12648 Proposed finding 30 contains the statement that during this period "Avery and Griswold both understood that stabilization of the prices on board would also have the effect of stabilizing all prices in the gypsum industry." This is in direct conflict with the testimony, from which it appears that the witness Griswold stated that he could not say that he and Mr. Avery ever discussed that feature (R. 622,623).

Proposed findings 30 and 31 contain at least five statements of the following nature: "Brown advised Griswold", "Avery advised Griswold", "Blagden advised Griswold", and "Blagden inquired of Griswold". All of the purported

statements which are thus prefaced come from a single exhibit (Ex. 141), which was a letter dated April 12, 1928, written by Griswold to the president of his company. The proposed findings referred to rely upon these hearsay statements to the utter exclusion of the testimony of Griswold, Brown and Blagden, which negates the accuracy of most of the hearsay statements made by Griswold (D. C. Op. R. 4115).

Proposed finding 32 contains statements to the effect that Holland, President of Universal, "became very active in 1928 in trying to persuade other board manufacturers to become licensees of USG" and that "in an effort to promote an industry-wide price-fixing license agreement with USG, contacted various board manufacturers." The Government thus disregards the facts as found by this Court that Holland neither acted, nor was told to act, as an agent or emissary of USG and that any interest by him in the settlement of litigation in the industry was motivated by his concern for his own company and the proposed merger that Universal was promoting (FF. 37; R. 4150) to which finding no error was assigned by the Government (R. 4178-4186). As this Court recognized in its opinion Holland himself testified that he was at no time a representative of USG and that he never had an understanding or agreement with USG that he would promote any plan looking toward the licensing of all of the industry under price-fixing agreements (R. 4114).

Moreover, defendants offered to prove (par. 18) that Holland was not authorized to represent USG or Avery in negotiations with other manufacturers of gypsum board and that any efforts which he may have made to induce such other manufacturers to become licensees of USG were independent efforts made by him without any authorization from USG or Avery and that such efforts were not the result of any agreement or understanding among the defendants or any of them.

Proposed finding 33 contains a prejudicial recitation of portions of a declaration, an intra-company letter of Black of American (Ex. 203) intended to create the inference that there was an agreement among the then non-licensees to enter into patent license agreements. It is not supported by any testimony. Furthermore, the inference sought to be drawn is contrary to the fact as concluded by this Court after its thorough and complete review of the evidence. 12649 (R. 4039). The impropriety of including such matters in findings of fact appears from the last sen-

tence of the proposed finding wherein the Government recognizes that the non-licensee companies did not take any action as a result of Holland's suggestion.

Proposed finding 34 contains a statement that after the meeting of October 11, 1928, "representatives of National had further conferences with representatives of USG concerning a license agreement, as a result of which the Board of Directors of National, on November 27, 1928, adopted a resolution authorizing the officials of the company to enter into a license agreement." This so-called finding is based wholly on a declaration, National's minutes (Ex. 197) without benefit of any testimony from USG or National as to what, if any, conference was had between them. Furthermore, there is not any evidence that representatives of National had further conferences with representatives of USG. The resolution in fact authorized officials of National "to take such action as regards entering a license agreement with the United States Gypsum Company on plaster wall-board as they may see fit" (Ex. 197); National did not take a license until May, 1929, when it settled its litigation with USG and paid damages in the amount of \$178,000 (FF. 9, R. 4137).

(6) PROPOSED FINDINGS 36-53 (DURING THE YEAR 1929)

Proposed findings 36 to 53, inclusive, are a summarization of the Government's view of what happened in 1929. These matters are dealt within the opinion of this Court (R. 3938-3943, 4116-4117) and are covered by the findings of this Court numbered 9-14, 33-34, 36-38, and 85 (R. 4136-41, 4149-50, 4160). The defendants made offers of proof (pars. 4, 18, 26-43) with respect thereto.

Proposed findings 36, 37 and 38 contain the Government's argumentative summaries of Exhibits 204 and 206 (letters from Holland of Universal to Haggerty of National) and Exhibit 205 (Haggerty's reply to the first Holland letter). This Court has already considered these exhibits in the light of the arguments of the Government and the evidence and has concluded that such arguments are unfounded in fact, and that such exhibits do not establish the charges of the complaint as to the events in 1929 leading to the settlement of litigation and taking of patent licenses (R. 4113-4114).

Proposed finding 40 summarizes, as evidencing conspiracy, a portion of the minutes of a meeting of the Board of Directors of National on May 14, 1929 (Ex. 198). But this

Court has previously considered those minutes, and has rejected the Government's version thereof (R. 4116).

Proposed findings 41, 42, 43 and 44 refer to National's telegram to Avery of May 17, 1929 (Ex. 716) and certain communications of Avery—all of which were written 12650 a few days prior to the meeting of May 21-23, 1929, and the Government's account of that meeting. The obvious purpose of the Government in the aforesaid proposed findings is to attempt to obtain findings that the communications referred to, as well as the May 1929 meeting itself, were part of an alleged "conspiracy extrinsic to the plurality of licenses". But this Court, in its opinion, has already rejected the Government's contentions (R. 4116-4117).

Proposed finding 43 contains the statements that, during the meeting of May 22, 1929, "USG passed out to each licensee a bulletin on board. Those present anticipated and expected that USG would fix a price on board which would be higher than the prices previously prevailing. Prices were raised by this bulletin." The implications of those statements are entirely unjustified as may be observed from the opinion of this Court (R. 4073-4074) and from this Court's findings Nos. 48, 59 and 88 (R. 4155-4161). The fact was that there was at no time any understanding or agreement or even discussion among the defendants as to what the prices of gypsum board would be upon execution of the licenses (FF. 58); and that after the execution of the licenses the licensees had nothing whatever to do with fixing the minimum prices at which the patented products were to be sold (FF. 59). The Court further found that after the signing of the May 1929 licenses, the USG bulletin established prices at the levels at which USG had been selling board just prior to the execution of those licenses; that subsequently bulletin prices were advanced over what they had been during the price war, but that the prices so established did not exceed those which prevailed prior to the first license and the price war; and that since 1935 prices on wallboard have been lowered so that they are less than prices which prevailed prior to the execution of the first license (FF. 88).

Proposed finding 43 contains the further statement that "the price bulletin passed out at this time (May 22, 1929) introduced a number of new practices into the industry. The principal innovation was the establishment of a basing point price system of distribution * * *". Those statements are flatly contradicted by the record. The method of pricing

incorporated in the first price bulletin was the same method of pricing that had prevailed in the industry for many, many years (R. 2908-2909).

Proposed finding 43 (last sentence) and proposed findings 44-45 and 47-49 repeat the argument in the Government's brief on the issue of whether the defendants conspired to continue price fixing in the gypsum industry after the expiration of the Utzman Patent through subterfuge, *i. e.*, by using the starch patent and bubbleboard application as vehicles for their illegal purpose. The Government's argument is based chiefly on certain memoranda of C. O. Brown of Certain-teed (Exs. 226, 227 and 231). However, that argument was fully considered by this Court in its opinion and was specifically rejected (R. 4039-4043). The fact 12651 was, and the Court concluded, that "There was no understanding or agreement that the starch and bubble patents or the proposed licenses would be used as a vehicle to obtain price control" (FF. 39, R. 4151). In the face of that finding it is obviously improper for the Government now to propose that this Court reach the opposite conclusion on the same evidence.

If, in the proposed findings referred to in the preceding paragraph, the Government intended to imply that the starch and bubble patents were invalid, or that they were not basic product patents, the necessity for rejecting such implications appears both from the opinion of the Supreme Court where it is stated that on the record in this case the validity of all patents involved must be assumed (333 U. S. at p. 388) and from this Court's prior finding with respect to these patents (FF. 24, 4146). Furthermore, defendants offered to prove (par. 61) that the principal patents of USG were basic patents and of such scope as to have great commercial value.

• Proposed finding 49 is not consistent with the facts, or in one instance, even with the Government's own prior argument. The source material from which that proposed finding has, with the aid of speculation, been derived, is the C. O. Brown memorandum (Ex. 231) in which he purported to report to the President of his company (Certain-teed) the happenings at the licensee meeting of August 6, 1929. The Government requests this Court to find as a fact the following: "It was decided at this meeting that Universal would assign its 'starch patents' to USG, and USG, in turn, would issue a single license contract with price control covering all patents and patent applications." That statement is

not supported by the C. O. Brown memorandum or by any other evidence in the record. The Government itself stated in its brief before the Supreme Court (pp. 83-4) that USG and Universal had reached an agreement about the purchase and sale of the starch patent prior to August 6, 1929, and cited the C. O. Brown memorandum in support of that statement. At the August 6 meeting USG announced its arrangement to purchase the starch patents and offered all of its licensees new licenses that would include in one document the outstanding patents of the earlier licenses, the starch patents, and the applications for patents on the bubble board invention; but there is not any evidence whatever that USG reached its decision in those respects at the August 6, 1929, meeting, nor is there any evidence that USG consulted any of the other defendants in reaching its decision.

Another statement in proposed finding 49 will serve to illustrate the method followed by the Government in preparing this set of proposed findings. In the C. O. Brown memorandum (Ex. 231) upon which the Government relies, Brown referred to the new license contract offered by USG to all of its licensees and stated: "The attorneys feel that such a contract would be exceptionally strong * * *". That statement of Brown appears in proposed finding 49 as follows: "Those in attendance accepted the view of 12652 their attorneys that such a contract would be exceptionally strong * * *". It does not appear from

Brown's memorandum to whom he referred when he spoke of "the attorneys"; yet the Government seeks a finding designed to create an inference that such views constituted action taken at the meeting. The impropriety of this particular proposal of the Government becomes obvious when it is recalled that this Court, in its opinion, arrived at a conclusion in respect of Brown's statement as to the attorneys' views which directly contradicts the conclusion for which the Government now contends (R. 4043).

Proposed finding 50 erroneously describes the Haggerty starch patent and the third Roos bubble application (apparently referring to the third Roos patent) as relating to a "process" for making porous or cellular board. Both patents covered the entire product and contained product claims. As this Court heretofore found, the patents "were upon the entire product, not merely upon * * * the starch in the Haggerty patent, or upon the bubbles or air cells in the Roos patents. These patents covered fundamental developments in the gypsum board manufacturing industry" (FF.

24, R. 4145). Moreover, these two patents in fact covered infringing inventions, contrary to the statement contained in the last sentence of proposed finding 50.

Proposed finding 52 is a highly prejudicial and inaccurate statement purporting to cover the purchase of the starch patent by USG from the Universal receivers. It states as a fact, without any basis whatsoever, that "one of the reasons USG purchased the starch patents was to secure issued patents upon which price-fixing could be based." It makes no reference to the fact that USG purchased the patent from Universal to avoid further infringement and to protect itself against claims for past infringement, nor to the fact that the Universal receivers made the sale and took the license from USG only after it had been submitted to and approved by the seven United States District Courts in which the Universal receivership was then pending. The facts with respect to these matters were accurately and fully covered in this Court's finding of fact No. 12 (R. 4138-40). There is no proper basis for suggesting that this Court should substitute the Government's proposed finding for the Court's finding of fact No. 12.

Proposed finding 53 purports to set forth some of the provisions of the November 1929 license agreements which, when taken together with several of the preceding findings and the general heading "The Conspiracy", is an argumentative statement designed to imply that the defendants had entered into a "conspiracy extrinsic to the plurality of licenses" to fix the prices of patented board under the November 1929 patent license agreements which the Government claimed were sham. The evidence in the case does not support any such implication; this Court found that there was no such conspiracy, but on the contrary, that the 12653 license agreements were executed at arm's length, that they were *bona fide* agreements—not sham agreements executed to disguise illegal purposes,—and that they were entered into in good faith by each of the companies independently (FF. 29-38, 57 and 85; R. 4148-50, 4155, 4160).

(7) PROPOSED FINDINGS 54-55 (THE NEWARK AND CELOTEX BOARD LICENSES)

Proposed findings 54 and 55 are a summarization of the Government's views regarding the Newark and Celotex licenses which matters are dealt within the opinion of this Court (R. 3943) and in its Finding No. 15 (R. 4141). The defendants made offers of proof (par. 43) with respect to Newark and Celotex.

Proposed finding 54 states that the "officers of Newark talked with officers of USG and were conversant with the general licensing arrangement that existed in the industry". This statement is taken from the Government's brief (p. 89) which cites Record 1861 as authority for the statement, but the reference does not support it.

American, on November 25, 1929, and Kelley, on April 23, 1930, took the so-called November, 1929 license agreements from USG. They were each independently negotiated and entered into, and there were no agreements or understandings of any kind with USG to issue identical licenses to them upon the condition that they would accept such licenses or that others in the industry had or would take similar licenses under said patents, but each of them was free to take or not take the license according to its own individual determination (FF. 37, R. 4150). Newark became the assignee under Kelley's license in 1939. Celotex became the assignee under American's license in 1939. Neither of these companies had anything to do with the negotiations or execution of any of the other 1929 licenses.

(8) PROPOSED FINDINGS 56-59 (THE METALLIZED BOARD LICENSES)

Proposed findings 56-59 are taken from the Government's brief (pp. 90-94) and, for the most part, are quoted verbatim. The metallized board licenses are dealt with in the opinion of this Court (R. 3943-3944 and 4047-4049) and are covered by its Findings Nos. 46-53 (R. 4152-54). The defendants made offers of proof (par. 44) with respect thereto.

The main charge made by the Government in its complaint in respect of the metallized board licenses is that set forth in par. 114 thereof (R. 30) that at the time of the execution of said licenses, none of the licensees, except National, intended to manufacture metallized board, but that all of said licensees, except National, intended to purchase metallized board from USG or National for resale to retail dealers and consumers at the prices and upon the terms and conditions of sale established by USG. In effect, the charge was one of resale price-fixing. No evidence was introduced to support the charge, and this Court found that it was without any foundation in fact (FF. 46-53; R. 4152-54). Apparently it has now been abandoned by the Government.

Plaintiff now seeks to have the Court find that the metallized board licenses were a part of a larger price-fixing plan under patent license contracts but there is no evidence in the

record to support such a charge. Moreover, defendants offered to prove (par. 44) that each of such license agreements was separately and independently negotiated by and between the licensor and the licensee, and that none of such agreements resulted from any agreement or understanding among the defendants or any of them. It is obviously improper for the Government to request such a finding.

(9) PROPOSED FINDINGS 60-65 (THE PERFORATED LATH LICENSES)

Proposed findings 60-65 are taken from the Government's brief (pp. 94-102) and, for the most part, are quoted verbatim. The subject is dealt within the opinion of this Court (R. 3944-3945 and 4044-4047) and is covered by its Findings Nos. 41-45 (R. 4151-52). The defendants made offers of proof (par. 45) with respect thereto.

The principal theme of the Government with respect to the perforated lath licenses is contained in paragraph 119 of the complaint (R. 31) where it is charged that : "USG, Certain-teed and American were informed, sometimes by patent counsel, and believed that said [perforated lath] patent was void and did not embrace in any of the specifications or claims thereof any patentable invention or discovery * * *. Said companies entered into said license agreements principally for the purpose of enabling USG to determine and fix the prices of perforated gypsum lath * * *". That charge was carefully considered by this Court and after reviewing the Government's evidence in support thereof including the testimony of Certain-teed's production Vice-President Whittemore and patent attorney Spencer, the Court concluded that it was without any foundation in fact (D. C. Op. R. 4044-4047; FF. 41-45, R. 4151-52).

Proposed findings 60-65 ignore the opinion of this Court and its findings with respect to the perforated lath licenses, and requests this Court to reverse its decision on the facts. Furthermore, the defendants offered to prove (par. 45) that each of the perforated lath licenses was made in good faith by the parties thereto and not with the understanding or belief on the part of either of such parties that the perforated lath patent was void. In addition the Supreme Court stated that the record in this case assumes the validity of all the patents involved (333 U. S. 388).

Proposed findings 60 and 61 not only fail to describe properly perforated lath, but state that it is an old art and that patents had been issued of that type before, with a view

12655 to implying that the patents are invalid. These suggested findings are indefensible in the light of the Government's own evidence on the subject, as carefully reviewed by this Court in its opinion where the Court gave an accurate description of the invention and its great commercial value and quoted from an expert from the Bureau of Standards to the effect that only USG's perforated gypsum lath having at least three-quarter inch holes, one to each sixteen square inches of surface, ever passed the one-hour fire test, and that no perforated lath with a hole less than three-quarters inch and not having holes arranged at least one to every sixteen square inches ever successfully passed the test (R. 4045).

Proposed finding 62 is an inaccurate and prejudicial statement based on declarations, the Henley intra-company memorandum to Whittemore (Ex. 313), regarding the negotiations for the original perforated lath license contracts for the purpose of creating the erroneous inference that these patent license contracts were negotiated as a part of a plan or scheme to organize the industry and stabilize prices by means of such license agreements. This Court found that the perforated lath licenses were entered into in entire good faith and for sound business reasons (FF. 41-45; R. 4151-2; D. C. Op. R. 4046-7).

Proposed finding 63 contains the wholly unwarranted statement that at the time Certain-teed, Ebsary, American and Kelly became licensees under the perforated lath patent they knew that their license contract "was to be part of a larger price-fixing patent license arrangement which was to embrace all or substantially all of the then existing licensees of USG." Not only is such a charge not contained in the complaint, but there is not any evidence in the record to support it and it is contrary to the findings of this Court on the evidence introduced with respect to the perforated lath licenses (FF. 43-45, R. 4152). Moreover, the defendants have offered to prove (par. 45) that each of such licenses was independently and separately negotiated and entered into by and between the licensor and licensee and that none of such licenses resulted from any agreement or understanding among the defendants or any of them.

Proposed finding 64 states that USG granted its royalty-free license under its perforated lath patent because it recognized that it could not bring the whole industry under the license, and further states that National and Texas refused to become licensees under the original license or the

royalty-free license "since acceptance of the license involved recognition of the validity of USG's perforated lath patent." This is taken verbatim from the argumentative statement in the Government's brief (p. 101) and is not supported by any record references, nor is there any evidence in the record which could be cited in support of it. On the contrary, the royalty-free license shows on its face that it was granted because of the fact that perforated lath, which also embodied the claims of the patents contained in the general board license, had attained such importance and constituted such a large volume of board that USG decided to grant its licensees the right to use this patent royalty-free, since they were already paying a royalty on all such board (Ex. 27, 29, 32; R. 4593, 4602, 4616).

Proposed finding 65 makes the statements that National and Texas have sold perforated lath at the same prices at which USG and its licensees have sold the same and that no action has ever been brought by USG for the infringement of its perforated lath patent. It is further stated that it is fair to assume that USG has strong doubts as to the validity of its perforated lath patent and has been reluctant to disturb the peace and harmony established by prior license agreements. This is pure argument without any foundation and certainly could not be made the subject of a finding of fact.

(10) PROPOSED FINDINGS 66-72 (PRICES)

Proposed findings 66-72 deal with the Government's charge that gypsum prices were maintained at arbitrary and non-competitive levels. This Court's findings Nos. 58, 59, 87 and 88 (R. 4155, 4161) and its opinion (R. 4051-5 and 4073-4) disposed of the Government's argument on this subject. Furthermore, the defendants made an offer of proof (par. 50) with respect thereto.

The complaint charges that the defendants were parties to contracts and agreements under which defendants conspired to restrain trade and commerce in gypsum board by concerted raising and fixing at arbitrary and non-competitive levels the prices of gypsum board manufactured and sold by the defendants (Compl. Par. 45(a), R. 10); and that pursuant thereto USG fixed and determined prices of board and raised, stabilized and maintained such prices at high, arbitrary and non-competitive levels by price bulletins circulated among its licensees which were adhered to by the licensees (Compl. Pars. 90, 91, R. 23).

These charges were specifically denied in defendants' answers (*e. g.*, R. 275, 289, 290), except that it was admitted that USG determined and established the minimum price at which each licensee might sell patented gypsum board made by it and licensees have sold a substantial part thereof at prices not less than the minimum price so determined.

In the series of proposed findings here under consideration, plaintiff would have the Court find that the defendants have raised, fixed and stabilized the prices of board, as stated in proposed finding 72, on the basis and in the light of six subsidiary findings (proposed findings 66 through 71) designed to establish, by a biased and incomplete statement of facts that defendants entered into a plan or scheme to raise prices of board to high, arbitrary and non-competitive levels. These proposed findings are contrary to the evidence and contrary to the prior findings of this Court.

12657 This Court in its opinion reviewed the testimony of the witnesses, Griswold, Blagden, Holland, George M. Brown, C. O. Brown, Nelson, Whittemore and Lenci, and the documentary evidence introduced by the Government and concluded that the evidence failed to prove either that the licenses were executed with an intent to fix prices at high levels, or at any given levels, or that in the operation under the licenses the prices of gypsum board were illegally raised to high, arbitrary and non-competitive levels (R. 4051-55, 4073-74). Thus, the evidence showed, and the Court so found, that the licenses were not executed with an intent to fix prices of gypsum board at high levels or any given levels; that there was at no time any understanding or agreement or even discussion as to what the prices of gypsum board would be upon the execution of the licenses; that after the execution of the licenses, the licensees had nothing whatever to do with fixing the minimum prices at which the patented products were to be sold; that the defendants did not by any of their operations under the license agreements, nor did they by any agreement or understanding, illegally raise or fix at arbitrary or non-competitive levels the price of gypsum board as charged by the Government; that, after the May, 1929 agreements were executed, USG established prices at the levels at which USG had been selling just prior to the execution thereof; that while prices were later advanced over what they had been during the price war, they did not exceed prices prevailing before the price war; and that since 1935 prices have been lowered substantially below the prices prevailing prior to the price war (FF. 58, 59, 87, 88; R. 4155, 4161).

Furthermore, defendants offered to prove that they did not, pursuant to any such agreement or understanding, raise such prices to arbitrary and non-competitive levels or establish and maintain such prices at unreasonably high levels (Offer of Proof, Par. 50).

Proposed finding 66 states that the execution of the four licenses in May, 1929, and subsequent execution in the latter part of 1929 and the first part of 1930 of the so-called November, 1929 licenses, marked a turning point in the gypsum industry. Proposed finding 66 then characterizes the demoralized condition of the gypsum industry in 1927-1929 as "keen and vigorous price competition * * * among the licensee manufacturers of USG on the one hand, and on the other hand, the non-licensee manufacturers of gypsum products." Such a characterization is undoubtedly intended to lend color to the Government's assertion in proposed finding 68 that the prices in USG's first price bulletin "represented a very substantial increase over the prices prevailing in 1927, 1928 and the first quarter of 1929", and to its conclusion in proposed finding 72 that "the defendants have raised, fixed and stabilized the prices of board * * *."

Proposed finding 67 then states that the price competition in 1927, 1928 and the first quarter of 1929 brought about substantially lower prices on board and other gypsum products; and reference is then made to various prices at which USG's sheetrock board and its substandard crown board sold during that period.

The unfairness of the Government's presentation in proposed findings 66 and 67 may be readily demonstrated. Not one word is said about the true situation in the gypsum industry during the period 1927-1929 which this Court found to be as follows (FF. 60, R. 4155):

"The gypsum industry in the 'Eastern area' was in a demoralized condition in the years 1927-1929. There was litigation, bad feeling, price cutting. The prices of board had fallen so low that for some manufacturers business was no longer profitable. Prices could not go down and business continue; any change would, as a matter of economic necessity, be upward."

Not only does the Government disregard this finding, but it proposes that the Court arrive at a conclusion on the Government's view of the facts that it has heretofore specifically rejected in its findings as shown above.

Proposed finding 68 states that the first price bulletin issued by USG to its licensees in May, 1929, "set a mill base

price of \$20 per thousand square feet" on first-grade wall-board and that "these prices represented a very substantial increase over the prices prevailing in 1927, 1928, and the first quarter of 1929." Here again no mention is made of the fact that the \$20 price was substantially lower than the price in effect prior to the execution of the first Beaver license in 1926, as was found by this Court (Finding 88; R. 4161). Furthermore, the proposed finding apparently seeks to create an impression that the \$20 price was a mill-base price whereas the \$18 price referred to in proposed finding 67 was a delivered price. The fact is that neither was the delivered price, but both of them were mill-base prices and the delivered price in each case was the mill-base price plus freight. The record shows that for many years prior to 1929 the industry had sold on the same basis as that used in the bulletin (R. 2908-09).

Proposed finding 69 refers to increases in the minimum price by subsequently issued price bulletins referring to the high in 1934 of \$28.50 per thousand for first quality wall-board. No mention is made of the fact as found by this Court (FF. 88; R. 4161), that since 1935, and prior to the filing of the complaint, prices have been lowered so that for several years last past, first quality wallboard has sold for \$23 per thousand feet and lath for \$13, as compared with \$30, and \$15-\$16 respectively before the first license. Furthermore, proposed finding 69 contains the unwarranted statement that during the same period "as the licensees fully anticipated", the price of plaster and other related gypsum products improved. There is no basis in the record for the finding that the licensee anticipated an increase in the price of other products, and it is contrary to the prior findings of this Court (FF. 73, 94; R. 4158, 4162).

Proposed finding 70 refers to the minimum price bulletins sent out by USG to its licensees, but fails to show, as found by this Court (FF. 18, R. 4143), that they were expressly limited to patented board.

Proposed finding 71 states: "In order to obtain a uniform—and hence noncompetitive—delivered price, USG in its price bulletins specified a basing-point system for delivery * * *". The fact is that the method of pricing specified in the price bulletins was the same method that had prevailed in the industry for many years (R. 2908-2909). The references by the Government to "absorbing an extra

freight cost" and "phantom freight" have nothing to do with the charges of the complaint or the issues litigated. Moreover, the proposed finding would have this Court find that "all mills were not basing points", notwithstanding the fact that the record is clear that prior to the time of the filing of his complaint all producing mills were basing points (R. 2909).

(11) PROPOSED FINDINGS 73-79 (NO. 2 BOARD AND SECONDS)

Proposed findings 73-76 deal with No. 2 Board and proposed findings 77-79 deal with Seconds. This Court considered these subjects in its opinion (R. 4061-2 and 4675-8) and made findings with respect thereto (FF. 67-69, 91, 92; R. 4156-7; 4162). Defendants' offer of proof on these subjects is contained in paragraph 55.

The complaint charges that the defendants conspired to restrain trade and commerce in gypsum board by concertedly standardizing gypsum board and its method of production by limiting the manufacture of board to uniform methods and producing uniform kinds of board (Compl. Par. 45(b), R. 10); and that in addition to the agreements contained in the licenses USG and its licensees mutually agreed among themselves that they would immediately discontinue the manufacture of second grade closed-edge board and would dispose of inventories of said boards at prices to be determined and fixed by USG (Compl. Par. 77(a), R. 18-19).

These charges were specifically denied in defendants' answers (e. g., R. 275, 284).

In the series of proposed findings here under consideration, plaintiff would have the Court find that defendants have eliminated No. 2 board and seconds from the market, as stated in proposed findings 76 and 79, on the basis of five largely unsupported subsidiary findings (proposed findings 73-75, 77, 78) designed to establish that defendants had entered into agreements or understandings to eliminate No. 2 board and seconds from the market. These proposed findings are contrary to the evidence and contrary to the prior findings of this Court.

12660 This Court in its opinion reviewed the testimony of all the witnesses interrogated on these points and the documentary evidence introduced by the Government with respect thereto and concluded that the uncontradicted evidence shows that a second in the parlance of the trade was a defective board produced unintentionally in the

process of manufacturing standard board and that No. 2 board was a board made of lower grade material than that used in the manufacture of standard board, both of which boards were made under USG's patents; that there was no agreement or understanding that seconds and No. 2 board would not be manufactured, but on the contrary that the licensees were free at all times to make and sell such boards; that there was no warrant in the evidence for a conclusion that the license agreements were executed with an intent to eliminate seconds and No. 2 board; and that the evidence fails to show that there was an elimination of either seconds or No. 2 board, but on the contrary the evidence showed that every company unavoidably made some seconds, although as they improved in the art of board manufacturing, there were naturally fewer and fewer seconds made (D. C. Op. R. 4061-62; 4075-78; FF. 67-69, 91, R. 4156-57, 4162).

Moreover, defendants offered to prove (par. 55) that there was no agreement or understanding among the defendants to eliminate such boards or otherwise standardize gypsum board or its method of production.

Proposed finding 73 contains the statement that "first-grade close-edge board, even at \$18 per thousand, was being driven off the market." This is unwarranted by anything in the record, which shows nothing more than that USG was deliberately sacrificing some sales of its first grade board rather than to reduce its price for that board to the level brought about by the severe price war which was going on in the industry.

Proposed findings 74 and 77 state that the parties to the license agreements understood that price control would best succeed with a uniform product and anticipated that one result of industry-wide licensing would be the elimination of No. 2 board and seconds. These statements, as shown, are unwarranted.

Proposed finding 76 and 79 would have this Court find that the defendants have eliminated No. 2 board and seconds from the market, apparently to create an inference that it was done pursuant to some agreement to do so. Such a proposal flies in the face of this Court's prior findings to the contrary. Moreover, the defendants have offered to prove (Par. 55) that there was neither any agreement or understanding among the defendants as to the price to be fixed for No. 2 board and seconds, nor any agreement or understanding that such board would not be manufactured.

12661 (12) PROPOSED FINDINGS 80-85 (OPEN-EDGE BOARD)

This Court dealt with Open-edge Board in its opinion (R. 4056-61, 4075) and made findings with respect thereto (FF. 54, 56, 62-3, 89-90; R. 4154, 4155-6, 4161). The defendants made offers of proof (pars. 46 and 54) on the subject.

The complaint charges that the defendants conspired to restrain trade and commerce in gypsum board by concerted ly standardizing gypsum board and its method of production by limiting the manufacture of board to uniform methods and producing uniform kinds of board (Compl. Par. 45(b), R. 10); and that in addition to the agreements contained in the license agreements USG and its licensees mutually agreed among themselves that they would immediately discontinue the manufacture of unpatented open-edge board and would dispose of inventories of said boards at prices to be determined and fixed by USG (Compl. Par. 77(a), R. 18-19).

The charge was specifically denied in defendants' answers (*e. g.*, R. 275, 284).

In the series of proposed findings here under consideration, plaintiff would have the Court find that defendants have eliminated open-edge board from the market, as stated in proposed finding 86, on the basis of six incomplete and erroneous subsidiary findings (proposed findings 80-85) designed to establish that first quality closed-edge board was unable to compete with open-edge board, that there could be no effective stabilization of prices on closed-edge board as long as open-edge board was sold without price control, and that defendants, in entering into the licenses, understood and agreed that unpatented open-edge board would be taken off the market. These proposed findings are contrary to the evidence and contrary to the prior findings of this Court.

This Court in its opinion reviewed the testimony of the witnesses called by the Government from Certain-teed, Ebsary and Texas, the three manufacturers who were making open-edge board at the time they took their licenses from USG in 1929, and also reviewed all documentary evidence submitted by the Government in support of its charges with respect to open-edge board. From such a review, this Court concluded that there was no agreement to discontinue the manufacture and sale of open-edge board, that the license agreements were not executed with an unlawful intent to eliminate the manufacture of such board and that the fact

that Certain-teed, Ebsary and Texas ceased manufacturing this type of board which was wasteful and not desired by the trade, once they had obtained the right to make the superior product, constituted no evidence that this was done by agreement (D. C. Op. R. 4055-61, 4075; FF. 54, 56, 62-66, 89, 90; R. 4154-56, 4162).

There is nothing in the Supreme Court's opinion which requires this Court, on the present record, to reverse its prior findings with respect to the subject of open-
12062 edge board. It is true that the Supreme Court, said (333 U. S. at page 397) that the provision in the license contracts that royalties be paid on production of unpatented board is strongly indicative of an agreement not to manufacture the unpatented board, and the testimony of the witnesses was ample to show that there was an understanding, if not a formal agreement, that only patented board would be sold. But that certainly did not constitute a holding that the defendants were precluded from adducing evidence to rebut that *prima facie* showing. Accordingly, the defendants offered to prove (par. 46) that the license provisions whereby each licensee for the privilege of using the patents covered by the contract agreed to pay as royalties a stipulated percentage of the selling price of all board, whether or not patented, were intended to secure to USG compensation for the use of all its patents and were insisted upon by USG in order to insure proper royalty payments due it under the licenses; and that such provisions were not inserted in the licenses for the purpose, or with the effect, of eliminating unpatented board.

Moreover, defendants offered to prove (par. 54) that there was no agreement or understanding among the defendants or any of them that the production of open-edge board would be discontinued; that each defendant was at all times free to make and sell such board; and that the discontinuance of the manufacture of open-edge board was entirely due to economic reasons.

Since the facts with respect to open-edge board are in dispute, and since the defendants were not permitted to introduce any evidence to substantiate their offers of proof, it is improper for the Government to request that its contentions be included in this Court's findings.

Proposed finding 80 would have this Court find that open-edge board actively competed with closed-edge board without disclosing the facts with respect to the disadvantages of open-edge board, which are fully covered in this Court's opinion (R. 4056-57).

Proposed finding 81 similarly seeks to create an inference that first quality closed-edge board was unable to compete satisfactorily against open-edge board, whereas the prices therein referred to were brought about not by the competition of open-edge board, but by the circumstances of the price war which was going on in the gypsum industry in 1927 to 1929.

Proposed finding 82 contains the unwarranted statements that the parties to the license agreements understood it was essential to the success of price control that unpatented open-edge board be taken off the market and "each understood that there could be no effective stabilization of prices on closed-edge board as long as open-edge board was sold without price control."

Proposed finding 83 would have this Court find that the parties to the license agreements anticipated that one result of industry-wide licensing would be the 12663 elimination of open-edge board from the market.

These findings are not supported by the record and they are furthermore entirely inconsistent and in conflict with the findings heretofore made by this Court (FF. 56, 62-63, 66; R. 4154-56).

Proposed finding 84 would have this Court find that the royalty provision in the license agreements tended to discourage the manufacture and sale of open-edge board. That proposed finding is in direct conflict with the prior finding of this Court that such provision was not intended to have and did not have such effect (FF. 54, R. 4154). Furthermore, it is in direct conflict with defendants' offer to prove (pars. 46, 54) that such provisions were not intended to eliminate and did not have the effect of eliminating unpatented board, and that the later discontinuance of the manufacture of open-edge board was due entirely to economic reasons. The royalty provision was in fact made solely to provide compensation to USG for the privilege of using its patents (FF. 54, R. 4154; Offer of Proof, par. 46).

(13) PROPOSED FINDINGS 87-88 (BOARD SIZES)

This Court dealt with Board Sizes in its opinion in connection with its discussion of the provisions of the price bulletins (R. 3945-6) and made its findings with respect thereto (FF. 18, 26, 28, 61, 89; R. 4143, 4147, 4148, 4155, 4161). The defendants made general offers of proof (Pars. 49, 51) with respect to the bulletin provisions (including board sizes).

The complaint charges that defendants concertedly standardized board under bulletins circulated by USG which were adhered to by the licensees and which contained provisions as to standard sizes of gypsum board with specified differentials for board of nonstandard sizes and prohibition of sales to dealers of board of nonstandard sizes (Compl. par. 45(b), 91(f), R. 10, 24).

These charges were specifically denied in defendants' answers (*e. g.*, R. 275, 290).

In the proposed findings here under consideration, plaintiff would have the Court find that defendants have standardized board, as stated in proposed finding 88, on the basis of an inaccurate and incomplete subsidiary finding (proposed finding 87) designed to establish that non-standard or odd sizes of board could be sold only at price differentials which were prohibitive and that standard sizes were agreed upon by defendants. These proposed findings are wholly unsupported by the record.

This Court, in its opinion, reviewed in great detail the provisions of the price bulletins issued by USG under its licenses and found that they only contained provisions establishing a minimum price at which the licensee might sell the patented board; that the license agreements were not executed with intent to accomplish any improper standardization of board or its method of production; and that the defendants did not by any of their operations under the license agreements, nor by any agreement or understanding, accomplish any improper standardization of gypsum board or its method of production as charged by the Government (D. C. Op. R. 3945, 3987-95; FF. 61, 89; R. 4155, 4161).

The fact of the matter is that sizes of all building materials fastened to walls of buildings normally follow standard measurements in building construction and gypsum board followed the same pattern.

Proposed finding 87 states that standard sizes of board were specified in USG's price bulletins, and that although non-standard or odd sizes could be manufactured and sold, the bulletins provided that they could only be sold at price differentials which were not only unrelated to the degree of variation from standard but were prohibitive. The bulletins (Ex. 7, Compl. 85, R. 95) show that plaintiff's statement that odd-size boards could only be sold at price differentials which amounted in some cases to as much as \$5.00 per thousand, is erroneous. The bulletins provided for only reasonable differentials for the manufacture of

special board; as a matter of fact, practically all of the output of the factories was standard-size board used in the regular building trades. As stated, there is no evidence to support the statement that these differentials were in any way prohibitive nor is there the slightest foundation for that statement anywhere in the record. It comes from page 114 of the Government's brief without benefit of any record citation. Similarly, the statement in proposed finding 87, that this standardization was possible only because all manufacturers were parties to the license agreements, is unsupported by any evidence.

The defendants have offered to prove (Pars. 49, 51) that USG did not even discuss the matter of price with its licensees; that all provisions of the price bulletins with respect to the terms and conditions of sale had direct relation to the prices fixed by USG; and that such provisions were not promulgated for the purpose of or with the effect of regimenting the industry, but solely for the purpose of defining the minimum price fixed by USG.

(14) PROPOSED FINDINGS 89-91 (BUNDLING)

This Court dealt with Bundling in its opinion (R. 4062-4065 and 4078-4079) and made findings with respect thereto (FF. 70-72 and 93; R. 4157-58, 4162).

The complaint charges that the defendants concertedly standardized gypsum board and its method of production by limiting the manufacture of board to uniform methods and by producing only uniform kinds of board (Compl. par. 45(b), R. 10). It is stated in the complaint that in the May, 1929 licenses the licensees agreed to use only the methods covered by USG's bundling patents (Compl. par. 76(b), R. 18); and that in the November, 1929 12665 license agreements the licensees agreed to pay royalties on bundling of all kinds whether patented or unpatented (Compl. par. 85(e), R. 21).

Defendants denied any improper standardization through or by reason of the licensing under the bundling patents (*e. g.*, R. 275, 283, 287).

In the proposed findings here under consideration, plaintiff would have the Court find that the defendants have standardized the packaging of board, as stated in proposed finding 91, on the basis of two inaccurate subsidiary findings (proposed findings 89 and 90), designed to establish that USG forced standardization of bundling upon the defendant licensees. These proposed findings are wholly unsupported by the record.

This Court, in its opinion, gave full and careful consideration to the evidence with respect to the Government's charges concerning the licensing and use of the USG bundling process. The Court concluded that the provisions in the May, 1929 licenses with respect to the exclusive use of the USG bundling process could not be held to support the charge of an intent to accomplish improper industry standardization since such a purpose, if it ever existed, was abandoned upon the execution of the November, 1929 licenses. It was further concluded that the provisions of the November, 1929 licenses requiring the licensees, for the privilege of using the bundling patents, to pay royalty on all bundles whether or not patented did not evidence an attempt to standardize by eliminating other methods of packaging in view of the evidence that there was no other process available; and that the evidence shows that the use of the bundling process, since execution of the November, 1929 licenses has been on its merit and for lack of a better one (D. C. Op. R. 4062-65, 4078; FF. 70-72; 93, R. 4157-58, 4162). The Court also pointed out that since the bundling patent covered merely a process of packaging it obviously could accomplish no standardization of board as such (R. 4078).

Proposed findings 89 and 90 state that USG owned Patent No. 1,696,877 which covered a process for bundling lath and that under the May, 1929 licenses USG forced that type of bundling upon the industry by requiring the licensees to use only that bundle; that when the November, 1929 license agreements were adopted the above provision was omitted but the licenses provided that the licensees would pay a royalty of 10¢ per thousand whether or not the bundles were made according to the patents. Proposed finding 90 states that the bundling of lath was standard practice brought about by two factors: (a) all manufacturers were parties to the licenses and (b) the requirements for royalties to be paid on all bundles whether or not the patent was used. This so-called finding is not supported by the record and ignores the Court's full consideration of the subject in its opinion and its conclusion that the matter was moot and that the reason for the use of the bundling patent was that there was no other satisfactory method of bundling gypsum board (R. 4062-65; 4075-79).

12666 (15) PROPOSED FINDINGS 92-96 (PLASTER PRICES)

This Court dealt with Plaster Prices in its opinion (R. 4065-4068 and 4079-4084) and made its findings with respect

thereto (FF. 73, 94, 97; R. 4158, 4162-63). Defendants made offers of proof (pars. 58, 59) on this subject.

The complaint charges that the defendants conspired to restrain trade and commerce by concertedly raising, maintaining and stabilizing the general level of prices for plaster and miscellaneous gypsum products (Compl. Par. 45(c); R. 10); that in addition to the agreements contained in the May, 1929 license contracts, USG and its licensees mutually agreed among themselves, among other things, that as prices for board were increased all companies would increase their prices for plaster and miscellaneous gypsum products (Compl. 77(d); R. 19); and that USG and its licensees have, by concerted action, controlled the prices and methods of distribution of plaster and miscellaneous gypsum products sold by them, all as is more fully set forth in paragraphs 103 to 107 of the complaint (Compl. Par. 96; R. 26).

These charges were all specifically denied in defendants' answers (e.g., R. 275, 284, 291).

In the proposed findings here under consideration plaintiff would have the Court find that the defendants attempted to stabilize the prices of plaster and other unpatented gypsum products, as stated in proposed finding 96, on the basis of four inaccurate subsidiary findings (proposed findings 92 through 95) designed to establish that the defendants anticipated that price stabilization on board would be accompanied with price stabilization on other unpatented products and an understanding by the licensees that they were not to reduce the price of plaster or other unpatented products; and that the defendants intended to stabilize the prices of plaster and miscellaneous gypsum products and did so by acting in concert to raise, maintain and stabilize the general level of prices for such products. These proposed findings are contrary to the evidence and contrary to the prior findings of this Court.

The Court, in its opinion, reviewed the testimony of all the witnesses called by the Government who were interrogated with respect to this phase of the case as well as the documentary evidence introduced by the Government in support of its charges. As a result, this Court concluded in its opinion and in its findings of fact that the evidence did not establish the Government's charge that the license agreements were *non bona fides* because executed with intent to raise, maintain and stabilize the level of prices of plaster and miscellaneous gypsum products; that there was

at no time any understanding or agreement among any of the parties to the license agreements that the prices would be raised or fixed upon plaster or any unpatented gypsum products; that the evidence does not establish the Government's charge that the level of prices of such products was raised, maintained or stabilized by their operations under the license agreements or otherwise; that the increase in the prices of such products over the prices during the 1927-1929 price war was not the result of any device adopted or action taken by defendants to bring about such increase; that the price bulletin providing against indirect price cutting on patented board by reducing the price of other products was but part of a larger provision concerning rebates and was not a device to raise, maintain or stabilize the price of plaster or miscellaneous gypsum products, nor did it have that effect; that the documents relied upon by plaintiff in support of its contention (Government's Exhibits 489 through 495, 497, 498, 500, 501, 727, 729 through 738, 746 through 749, 758 and 759) are letters dealing with alleged violations of the minimum price on patented gypsum board and do not establish that the defendants raised, maintained or stabilized the price of unpatented materials (D. C. Op. R. 4065-68, 479-84; FF. 57, 73, 86, 94-97, R. 4155, 4158, 4160; 4162-63).

The Supreme Court in rejecting this Court's findings with respect to prices of plaster and unpatented gypsum products mentioned only two items of the evidence now relied upon by the Government, namely, the bulletin provision and the complaints to Board Survey (333 U. S. at 339), from which it expressed the view that the defendants had attempted to stabilize plaster prices, and the fact that the prices were stabilized only when plaster was sold in conjunction with board appeared to be immaterial: but certainly on the state of the record this could only refer to a *prima facie* showing and it cannot be reasonably suggested that the Supreme Court thereby held that the defendants would be precluded from introducing evidence to rebut the showing made by the Government on the issue. Accordingly by the defendants offered to prove the following:

"There was not any agreement or understanding among the defendants or any of them that prices of plaster or any other unpatented gypsum produce would be raised, fixed or stabilized, nor did the defendants by any concert of action or otherwise raise, fix or stabilize any such prices." (Offer of Proof No. 58).

"Defendants' prices for plaster and other unpatented products have at all times been highly competitive, and were not in any way affected by the minimum prices established by the licensor for the patented board. The so-called rebate provisions of the price bulletins were not promulgated for the purpose, and did not have the effect, of fixing or stabilizing the prices of plaster or other unpatented products; nor did the defendants by complaints addressed to Board Survey Company or by any of its activities fix or stabilize prices of plaster or other unpatented products." (Offer of Proof No. 59).

The facts, therefore, are in issue. It is improper for the Government to request this Court to include the Government's version of those facts in its Findings.

12668. Proposed finding 92 states without justification or warrant that the parties to the license agreements understood that an industry-wide licensing arrangement, fixing and stabilizing the price of board, would also tend to stabilize the prices of all other unpatented gypsum products and that the parties anticipated that price stabilization on board would be accompanied by price stabilization of all other unpatented gypsum products. Such a finding is contrary to the opinion heretofore rendered and the findings of this Court heretofore made. It is not supported by the record. The statements therein contained are lifted from the Government's brief, page 152, wherein Record 622 is cited, but as hereinbefore pointed out the testimony of Griswold does not support the statement and this Court took a different view of Griswold's testimony and arrived at a different conclusion (R. 4067-8).

Proposed finding 93 consists of an inaccurate description of the USG price bulletin containing the provision against reduction of the price on patented board by means of rebating. This bulletin provision was fully reviewed by the Court in its opinion (R. 4079) and accurately described by this Court in its Finding 95 heretofore made wherein it is said that it was but part of a larger provision concerning rebates and allowances made for the purpose of preventing the reduction of the licensees' price on patented board below the minimum price therefor—a price-protective provision; that it was not a device to raise, maintain or stabilize the price of plaster or miscellaneous gypsum products, and it was not applied by the defendants to that end; nor did it have that effect (R. 4162-63).

Proposed finding 94 incorrectly states that complaints were filed with Board Survey by licensees charging the licensor and other licensees with reducing the price of plaster or other unpatented gypsum products sold in conjunction with board, from which it is concluded that it is apparent that the licensees understood they were not expected to reduce the price of plaster or other unpatented gypsum products. Thus, the plaintiff is asking this Court to make findings entirely inconsistent with and contrary to its prior conclusion that these complaints had to do with alleged sales of the patented board at less than the minimum price, and that neither the bulletin provision nor the operation thereunder was a device for controlling the price of plaster and miscellaneous gypsum products (D: C. Op. R. 4080-84, FF. 96-98; R. 4163-64).

Proposed finding 95 states that USG's refusal to give its consent to the selling of board at a discount to Cardiff Gypsum Company, a plaster manufacturer, was "for the reason that Cardiff had a reputation as a price cutter of plaster." The assigned reason is without foundation in the evidence except for speculation on the part of the witness Sensibar of Cardiff. This Court had the opportunity of

hearing the Cardiff testimony and considering first-12669 hand its value. Considerable doubt was expressed by the Court as to the admissibility of the testimony for any purpose, but it was finally received "for what it was worth", with respect to plaster prices under paragraph 45(c) of the complaint, and subject to doubts as to its weight (R. 2733, 3234-6). There is not any reference to the Cardiff testimony in this Court's careful analysis of the evidence as to the alleged raising and stabilizing of plaster prices, undoubtedly because it was finally concluded that such evidence was without probative value.

(16) PROPOSED FINDINGS 97-105 (JOBBER)

This Court dealt with jobbers in its opinion (R. 4068-4070, 4084-4089) and made its findings with respect thereto (FF. 75-79, 99-102; R. 5158-9, 4164). The defendants made offers of proof (pars. 56, 57) on this subject in paragraphs 56 and 57.

The complaint charges that the defendants conspired to restrain trade and commerce in gypsum board, plaster and miscellaneous gypsum products by concertedly refraining from distributing such products through jobbers and refusing to sell said products to jobbers below dealer prices

(Compl. Par. 45(d), R. 10); that for the purpose of limiting jobber distribution by licensees to those jobbers who sold only to dealers and who maintained bulletin prices in sales to dealers, the defendants agreed in their licenses to sell to jobbers only with the express consent of USG, and that pursuant thereto USG, during the period from 1929 to 1932 permitted its licensees to sell only to jobbers who sold only to dealers and maintained bulletin prices in said sales (Compl. Par. 94, R. 25); that for the purpose of eliminating distribution of gypsum board, plaster and miscellaneous gypsum products through jobbers, USG and its licensees agreed among themselves to sell gypsum board to jobbers at no less than the minimum prices set by USG for sales to dealers and to sell plaster and miscellaneous gypsum products to jobbers at no less than the prevailing market price to dealers for said gypsum products; that pursuant to such agreement USG in 1932 issued and circulated license bulletins prohibiting sales to jobbers at less than dealer prices and since that time, USG and its licensees have refused to sell board to jobbers at less than the minimum dealer prices set by USG, and have refused to sell plaster and miscellaneous gypsum products to jobbers at less than the prevailing market prices to dealers for said products (Compl. Pars. 94, 95, R. 25-6).

These charges were specifically denied in defendants' answers (*e. g.*, R. 275, 290).

In the series of proposed findings here under consideration, plaintiff would have the Court find that defendants have eliminated jobbers of board in the industry, as stated in proposed finding 105, on the basis of eight subsidiary findings (proposed findings 97 through 104) designed to establish that the defendants had entered into an agreement or arrangement to eliminate jobbers of gypsum board, that the purpose and effect of leveling off prices by the bulletin of August 8, 1930, was to eliminate such jobbers and, that after the bulletin the defendants concertedly policed the sales practices of the others to that objective. These proposed findings are contrary to the evidence and contrary to the prior findings of this Court.

The Court in its opinion reviewed the testimony of all the witnesses called by the Government with respect to the jobber question, as well as all the documentary evidence introduced by the Government in support of those charges. As a result, this Court concluded in its opinion and its findings of fact that the license agreements were not executed

with an intent to eliminate jobbers through the discontinuance of a sales discount or otherwise; that there was no agreement or understanding between any of the parties to the license agreements whereby jobbers would be eliminated from the gypsum board distributive system, nor was there any agreement or understanding that the jobbers' discount would be discontinued; that the defendants did not by their operations under the license agreements effectuate any improper restriction upon the distribution of gypsum board, plaster and and miscellaneous gypsum products as charged by the Government; that the exchange of letters between Kling and Avery (Exs. 181 and 182) do not establish an intent to eliminate jobbers but on the contrary an intent to continue to deal with them; that the bulletin of May 24, 1929 (Ex. 408) requesting licensees to send USG a list of jobbers, and the discussions at the licensee meeting of June 6, 1929, do not establish an intent to eliminate jobbers or withdraw the discount; that the price bulletin of August 8, 1930 (Ex. 430) discontinuing the established discount did not eliminate jobbers, but that there were still jobbers performing a proper jobbers' function in the purchasing of board and reselling the same to small dealers; and that the communications between Ebsary, Board Survey and USG (Exs. 438, 471, 502) do not establish concerted action to eliminate jobbers, such exhibits being complaints that the patented board was being sold by a licensee at less than the minimum price (D. C. Op., R. 4068-70, 4084-89; FF. 57, 75-79, 99-102; R. 4155, 4158-59, 4164).

The Court also concluded in its opinion and in its findings that the charge in the complaint of improper restrictions upon the distribution of plaster and miscellaneous gypsum products had not been established, no evidence having been introduced in support of the charge that the defendants had effectuated a restraint upon distribution of such products through jobbers, and the bulletin establishing the jobber discount and the one making the price to jobbers and dealers the same, applying only to patented board (FF. 103, R. 4159). No assignment of error was made by the Government to this finding (Government's brief, p. 160).

12671 While the Supreme Court, in its opinion, stated that it was unable to agree with this court's findings as to jobbers of board, saying "the inference we draw from the uncontradicted evidence is that the defendants acted in concert to eliminate an important class of job-

bers" (333 U. S. 398), that Court did not by its decision preclude the defendants from an opportunity to contradict both the evidence upon which the Supreme Court's inference was based and the inference itself.

The defendants offered to prove (par. 56) that the license agreements were not executed with any intention to eliminate jobbers, and that there was not any agreement or understanding among the defendants or any of them to do so. Furthermore, the defendants offered to prove (par. 57) that the discontinuance of the jobbers' discount resulted solely from the exercise by USG of what it deemed to be its right to establish a price for a patented product, not from any agreement or understanding of USG with the other defendants or any of them.

If the Government claims that the issuance of the price bulletins removing the jobbers' discount did in effect, without regard to any agreement or understanding among the defendants, eliminate certain jobbers in the industry, a thing not really charged in the complaint, a decree granting relief on the main issue, cancelling all the license agreements and bulletins and enjoining further adherence to any of the price provisions thereof or of any similar plan, would give all the protection that is necessary since it would eliminate the bulletin of which the Government complains as well as any possible enforcement of a like provision.

Proposed finding 102 states, among other things, that the purpose of the bulletin of August 8, 1930, making the jobber price the same as the dealer price "was to eliminate jobbers of board from the gypsum industry" notwithstanding the fact that the licensor, USG, who issued the bulletin, has not as yet been afforded an opportunity to present its proof as to the reason and purpose of the issuance of this particular bulletin, and notwithstanding the fact that this Court has found that "many jobbers continued to buy board and were able to perform a proper jobbers' function." (FF. 100, R. 4164).

Proposed finding 103 is a prejudicial statement regarding the few instances in which a sale to a jobber by a licensee at less than the minimum price established by the August 8, 1930, bulletin was brought up by the licensor at a meeting in an effort to secure compliance with the price bulletin. There was no practice of policing by concerted action to enforce the bulletin provision. These statements as to the effect of calling these license violations to the attention

of the licensees are purely conjecture and not in any way supported by the record.

Proposed finding 104 would ask this Court to make findings as to the purpose and effect of the Board Survey complaints which are inconsistent and in conflict with 12672 the findings of this Court heretofore made (FF. 102; R. 4164. The inference sought to be conveyed by this finding, i.e., that there was a practice of policing among the defendants to eliminate jobbers from the industry, is not warranted by the evidence (D. C. Op., R. 4068-72, 4084-89).

(17) PROPOSED FINDINGS 106-114 (RESALE PRICES OF MANUFACTURING DISTRIBUTORS)

This Court dealt with Manufacturing Distributors in its opinion (R. 4071-4072, 4089-4100) and made its findings with respect thereto (FF. 81-84, 104; 117; R. 4159-60, 4165-67). Defendants made offers of proof (Par. 60) with respect to Manufacturing Distributors.

The complaint charges that the defendants were parties to contracts and agreements under which defendants conspired to restrain trade and commerce in gypsum board by concertedly inducing and coercing manufacturing distributors to resell gypsum board at prices fixed by defendants (Compl. par. 45(e); R. 10); and that USG and its licensees, by concerted action induced and coerced manufacturing distributors to resell gypsum board at bulletin prices fixed by USG (Compl. par. 108-11; R. 29).

These charges were specifically denied in defendants' answers (e.g., R. 293).

In the series of proposed findings here under consideration, plaintiff would have the Court find that defendants have attempted to control the resale prices of manufacturing distributors, as stated in proposed finding 114; on the basis of eight largely erroneous and unwarranted subsidiary findings (proposed findings 106 through 113) designed to establish that the defendants entered into an agreement or arrangement to fix the resale price of manufacturing distributors, that the consent clause to sell manufacturing distributors was intended as a means of controlling such resale price and that the defendants acted in concert to maintain such resale price by furnishing price lists and other means. These proposed findings are contrary to the evidence and contrary to the prior findings of this Court.

Although the bill of particulars listed nine so-called manufacturing distributors, plaintiff introduced evidence with respect to only three of them. This Court in its opinion reviewed all of the testimony and documentary evidence introduced by the Government in support of its charges of resale price maintenance on manufacturing distributors' sales and concluded in its opinion and in its findings of fact that the license agreements were not executed with an intent to fix the prices at which manufacturing distributors would resell gypsum board; that there was no understanding or agreement of any kind that the resale prices of manufacturing distributors would be regulated or controlled; that the clause of the licenses forbidding sales to manufacturing distributors without the written consent of USG 12673 was not intended to control the prices of such distributors and was not so used; that the defendants did not by any of their operations under the license agreements or otherwise fix the prices at which manufacturing distributors resold board as charged by the Government, the evidence failing to establish that such resale prices were controlled either by (a) the consent clauses of the licenses, (b) the supplying to manufacturing distributors by their licensee sellers of the bulletin dealer prices on board, (c) the policing of manufacturing distributors sales of board or (d) the limiting of the manufacturing distributors' discount to approximately the cost of handling the board; that USG freely, and without conditions attached, granted consents to sell and once granted, no consent was ever withdrawn; that no one from the board manufacturing companies or Board Survey ever investigated any manufacturing distributor with respect to its resale prices and no one from USG or any other board manufacturer ever threatened to stop selling board to a manufacturing distributor on account of prices charged on its resales; and that the Board Survey correspondence relied upon by the Government (Exs. 436-447, 449-450, 463, 464, 512, 513-A and 514) did not establish any control of or attempt to control manufacturing distributors' resale prices but merely involved the checking of the price at which the licensee had sold the board to the manufacturing distributor (D. C. Op., R. 4071-72, 4089-4100; 2 FF. 57, 81-84, 104-117; R. 4155, 4159-60, 4165-67).

Furthermore, the defendants offered to prove (par. 60) that there was no agreement or understanding of any kind between the licensor and any licensee by which any manu-

facturing distributor was required to adhere to any price or term or condition or sale upon resale of any product bought from any of the defendants; that there was no agreement or understanding among the defendants, or any of them, that they would fix or control the resale prices of manufacturing distributors; and that none of the defendants fixed or controlled any such resale prices.

Proposed finding 106 inaccurately describes the terms of the November, 1929, licenses as regards manufacturing distributors, since there is no provision therein for "a discount from the dealer's price in such sales" on sales to manufacturing distributors (R. 77-8), although they did buy at a discount.

Proposed finding 107 would have the Court find that, according to Avery's express statement, the consent clause in the licenses was incorporated as a means of controlling the resale price of manufacturing distributors and that it was intended, in case a manufacturing distributor sold below the fixed dealer price, to withdraw the consent; and that Avery, by using the words "not to defeat the license" could only have meant defeating price control. There is no evidence in the record to support the statements made in

the proposed finding, as appears from this Court's 12674 consideration of the point in its opinion (R. 4072, 4089-91). The provision requiring consent to sell manufacturing distributors in the license is open to no such construction, and this Court so held when it found that the clause "was not intended to control the prices of such distributors, nor was it so used" (FF. 84, R. 4160). In his letter Mr. Avery said the provision was to prevent the licensee from defeating the license by manufacturing for other manufacturers or wholesale distributors, which had reference to the possible abuse by the licensee of the right to sell manufacturers to circumvent its obligations under the license. The letter does not state that the provision was to be used to compel adherence to the price provisions by the purchaser or that the consent would be withdrawn if the purchaser failed to sell at the licensee's minimum price, nor is the language used open to any such construction.

Proposed finding 108 demonstrates the unfairness of the Government's approach, as appears from a comparison of the manner in which this Court handled this subject in its finding 106 (R. 4165) where it found that USG freely granted consents to licensees to sell board to manufacturing

distributors; that no consent, once granted, was ever withdrawn; and that USG never used the consents to control or attempt to control in any way the resale price of manufacturing distributors.

Proposed finding 109 would have the Court find that manufacturing distributors were furnished by their suppliers with their price lists on board, which were identical with the prices in the minimum price bulletins of the licensees. Obviously this proposed finding seeks to create an inference of agreement that the manufacturing distributors would follow the minimum price bulletins in their resale of the board, in support of finding 114. There is no evidence whatever in the record to support any such inference (D. C. Op., R. 4091-4), and the proposed finding is wholly inconsistent and in conflict with this Court's finding 108 (R. 4165) that "the furnishing by the licensees of information with respect to their dealer prices to the manufacturing distributors was to enable the distributors to determine their own net cost of the board, and not for the purpose of controlling the manufacturing distributors' resale prices."

Proposed finding 110 would have the Court find that manufacturing distributors were expected to maintain the supplier's prices or they would lose their source of supply. There is no evidence whatever in the record to support this finding, which is directly contrary to the statement made in the opinion of this Court that "the manufacturing distributors themselves testified that they had no agreement with their suppliers to resell board at any particular prices" (R. 4092). Furthermore, this Court found that "none of the manufacturing distributors had any agreement with its supplier to resell board at any particular price or prices" (FF. 108, R. 4165).

12675 Proposed finding 111 would have the Court find that some of the licensees were under the mistaken notion that the patent laws gave the patentee the right to control the resale prices of patented products. This is a good illustration of the unfairness of plaintiff in requesting a finding on an incomplete and inaccurate statement of the evidence. Lenci testified that from something he had read, and not from anything occurring at any of the licensee meetings, he had obtained the impression that the ownership of a patent carried with it the right to control resale prices, but that at one of the licensee meetings in 1932 counsel for the licensor corrected his erroneous impression (D. C. Op., R. 4072). In its opinion, this Court, after referring to the

same testimony, concluded that the license agreements were not executed with intent to fix prices at which manufacturing distributors might resell gypsum board, nor was any such thing done in the operation thereunder (R. 4072, 4100).

Proposed finding 112 would have this court find in substance that USG, through Board Survey, policed the resale prices of manufacturing distributors. There is no evidence in the record to support any such finding (D. C. Op., R. 4094-7). In this the plaintiff is asking this Court to completely reverse its findings heretofore made that there was no investigation and regulation of the resale prices of manufacturing distributors on gypsum board and that the Board Survey exhibits relied upon had to do with the licensees' minimum price to the manufacturing distributors and not the latter's resale price (FF. 111-116, R. 4166-7).

Proposed finding 113 would have the Court find that a licensee threatened a manufacturing distributor that unless it maintained the resale prices the distributor would not be supplied by the licensee with board and that USG knew and approved of this threat. The finding is based upon the Government's construction of Ebsary's correspondence with the licensor complaining of a suspected improper deal between the licensee Kelley and his purchaser Structural (Exs. 436-442, 445-447, 450), which construction is not warranted by the correspondence or the testimony of Lenci with respect thereto, and there is not the slightest foundation for the statement made by plaintiff that the licensor approved any such threat as stated by plaintiff. This Court reviewed these very exhibits and the testimony with respect thereto in its opinion, and concluded as follows (R. 4097):

"It is apparent from the foregoing that when the evidence concerning the alleged control by the defendants of the resale prices on board of manufacturing distributors by 'policing' such resale prices is considered as a whole, it fails to establish such control or any attempt thereat."

(18) PROPOSED FINDINGS 115-119 (ALLEGED EXCLUSION OF CARDIFF FROM MARKET)

This Court did not touch upon the Cardiff evidence in its opinion except to note the limited purpose for which 12676 it was received (R. 4090). The Court made no findings with respect thereto.

There is no charge in the complaint that the defendants agreed to refrain from distributing gypsum board to any

manufacturing distributor, nor is there any charge in the complaint that the defendants agreed among themselves to exclude any manufacturing distributor from the board market or to refuse to consent to sell Cardiff patented gypsum board. There is nothing in the bill of particulars covering any such subject.

In the proposed findings here under consideration, plaintiff would have the Court find that defendants have excluded Cardiff from the board market, as stated in finding 119, on the basis of four subsidiary findings (proposed findings 115 through 118) designed to establish that the defendant companies other than USG were willing to sell board to Cardiff at a discount provided USG gave its consent thereto but refused to sell Cardiff without USG's consent and, consequently, that there was concert of action among the defendants to deny Cardiff the right to buy board from any of them. There is no evidence whatsoever in the record to support a finding that the defendants have excluded Cardiff from the board market.

The proposed findings in this respect are based wholly upon the evidence of Sensibar of Cardiff, which the Court characterized as of doubtful value for any purpose but received it only under Paragraph 45(c) of the complaint charging that the defendants agreed to restrain trade and commerce by concertedly raising, maintaining and stabilizing the general level of prices for plaster and miscellaneous gypsum products (Compl. Par. 45(c)). Thus, Justice Stephens said, with respect to certain exhibits in connection with the Cardiff evidence (R. 2733):

"* * * all of us are agreed, all of the Judges, that they are not admissible under paragraph 45(e).

"Judge Jackson and I are of the view that they are admissible under paragraph 45(c), where it is charged that the defendants concertedly raised, maintained and stabilized the general level of prices for plaster and miscellaneous gypsum products.

"We think the proffered evidence may possibly support an inference that the defendants were trying to keep their own prices on plaster up, by keeping the prices of other people up, although it seems to Judge Jackson and myself that it might support a different inference, that it was a kind of indirect rebating or gift enterprise.

"Judge Garret is doubtful, I think, whether the evidence is admissible on any theory. In fact, I think it is

his view that it is not admissible under any theory of the complaint. But * * * the majority of the Court think it is admissible, without commenting on its weight
* * *

12677 Thereafter, in ruling on the admissibility of other evidence in respect of the Cardiff situation, Justice Stephens said (R. 3236):

"Judge Jackson and I will rule as we did before, that the evidence is admissible for what it may be worth, subject to the same doubts that we expressed previously as to its value, under paragraph 45(c)."

As has been noted above, the Court apparently decided that the Cardiff evidence was not of any probative value in respect of the charge that plaster prices had been stabilized and, in its careful and detailed opinion on that point, did not make any reference thereto. The Government here makes a different charge,—one that is not embraced in the complaint and that has not been litigated in this action—namely, that the alleged exclusion of Cardiff from the gypsum market constituted a monopolization of trade. The proposed findings are arbitrary and wholly unwarranted by the record.

(19) PROPOSED FINDINGS 120-129 (TRUCKING DELIVERIES)

This Court dealt with trucking deliveries in connection with its general discussion of the bulletin provisions (R. 3945-3947, 3987-3991), and made its findings with respect thereto (FF. 18, 26, 27; R. 4143, 4147). The defendants made offers of proof (pars. 49, 51, 52) with respect to the bulletin provisions.

The complaint charges that the defendants conspired to restrain trade and commerce in gypsum board by concertedly raising and fixing at arbitrary and non-competitive levels the prices of gypsum board manufactured and sold by defendants (Compl. 45(a), R. 10); and that USG issued bulletins setting forth the prices and terms and conditions of sale for gypsum board, to which licensees adhered (Compl. Pars. 90, 91, R. 23).

These charges were specifically denied in defendants' answers (*e.g.*, R. 275, 289, 290), except that it was admitted that USG has determined and established by price bulletins the minimum price at which a licensee might sell patented gypsum board made by it and licensees have sold a substantial part thereof at prices not less than the minimum so determined.

In the series of proposed findings here under consideration, plaintiff would have the Court find that the defendants have eliminated all competition on board at the distribution or service level, as stated in proposed finding 129, on the basis of nine subsidiary findings (proposed findings 120 through 128) designed to establish that defendants entered into an agreement or arrangement to eliminate such competition through the use of USG price bulletins, which are said to have regulated the delivery of board by providing for an all-rail basing point method of pricing by 12678 specifying so-called "trucking areas" in which manufacturers could deliver board by truck, and by designating certain mills and warehouses at which "pick-ups" by dealer's trucks could be made. These proposed findings are contrary to the evidence and contrary to the prior findings of this Court.

This Court dealt with the evidence regarding truck deliveries in connection with its general discussion of the price bulletin provisions and concluded in its opinion and in its findings that the direct and indirect price provisions of the bulletins were proper in view of the fact that the ultimate price at which the patented product is to be sold cannot be arrived at merely by naming an amount, but that other factors which have economic relationship to price such as terms of payment, cost of delivery to various areas including freight charges, quantity sold, type of product sold and the like must also be stipulated and that the price protective provisions of the bulletins related only to the minimum prices established on the patented product and were designed solely to protect such prices; that the terms and conditions of the license agreements and price bulletins in this case, as compared with the terms and conditions, including price provisions, in the *General Electric* case, disclose no material distinction; and that the price bulletins and particularly the price protective provisions thereof were valid provisions for protecting the minimum price established (D. C. Op., R. 3945-47, 3587-91; FF. 18, 26-28, R. 4143, 4147-48).

Defendants offered to prove (par. 51) that "All of the provisions of the license bulletins with respect to terms and conditions of sale had direct relation to the price for such products fixed by the licensor and were not promulgated for the purpose or with the effect of regimenting the industry, but solely for the purpose of defining the minimum price fixed by the licensor in the license agreements, and providing for its maintenance on the patented board".

Proposed finding 120 would have the Court find that in addition to fixing prices and terms and conditions of sale by means of a basing-point pricing system "which was new in the industry", the price bulletins regulated delivery of board under two other methods, specifying areas in which the manufacturers could deliver board by truck, and by designating certain mills and warehouses for pick-ups by dealer's trucks. We shall discuss the basing-point question later under this heading but, in passing, point out that the statement that basing points were new in the industry is incorrect since the industry has always sold on the same basis as that used in the bulletins (R. 2908-9). The statement that USG regulated the delivery of the board by defining trucking areas and providing for pick-ups as above stated, is an argumentative statement directly in conflict with the facts and the findings of this Court as above stated. Furthermore, the statement that trucking areas and pick-ups were new to the industry is inaccurate and there is no evidence to support it in the record.

12679 Proposed findings 121-126 constitute a prejudicial and inaccurate recitation of the Government's construction of certain price bulletins establishing minimum prices on patented board in truckload quantities and minimum prices for pick-ups of patented board, which is contrary to the facts and to this Court's prior findings with respect thereto. The bulletins did not define trucking areas but merely fixed the prices in trucking areas. The bulletins did not regulate the point where the manufacturers could deliver, but merely specified the price of delivery to dealer's warehouse. The statements in proposed findings 123-124 regarding delivery in manufacturers' trucks and the amount of dunnage to be placed in trucks have reference only to indirect price-cutting, with respect to which the bulletin provided that sales of patented products, although ostensibly made at the minimum price, would nevertheless be considered to be in violation of the license agreement if the licensee directly or indirectly reduced the price charged below the minimum price by granting rebates, etc., including hiring customers' trucks and including board under the guise of dunnage, which this Court held were proper provisions against indirect price-cutting.

Proposed finding 125 would have the Court find that the price bulletins prohibited a manufacturer from trucking into a non-trucking area or from delivering in a trucking area less than a minimum quantity of board. The fact is

that there was no prohibition against use of trucks or any other form of transportation in any part of the country. Where a delivered price for truckload quantities was established by the licensor, it was because it was feasible and economical to deliver by truck, as this Court found (FF. 18, R. 4143).

Proposed finding 126 refers to bulletin provisions with respect to pick-ups at designated mills and warehouses by truck from the manufacturers by dealers. As has heretofore been shown, the price bulletins were issued by the licensor for the sole purpose of fixing the minimum price of patented board.

Proposed finding 127 would have the Court find that the parties policed the trucking practices of manufacturers to assure uniform delivered prices, in which connection trucking regulations were discussed at licensee meetings, and that the practice of so doing was an effective means of assuring future compliance with the trucking regulations. There is no evidence in the record to support this statement. The discussions at the licensee meetings amounted to no more than a discussion of minimum price violations as this Court found (FF. 20, R. 4144).

Proposed finding 128 is but an argumentative summation of what has been proposed in findings 120 through 127 for the purpose of attempting to support the conclusion that they had the effect of eliminating all competition on board between USG and its licensees at the distribution or service level. As shown, there is no foundation for any such conclusion.

12680 (20) PROPOSED FINDINGS 130-133 (BOARD SURVEY, INC.)

This Court dealt with Board Survey, Inc. in its opinion (R. 3946-3947, 4033-4034), and made its findings with respect thereto (FF. 20, 35; R. 4143-44, 4149). Defendants made offers of proof (par. 53) on this subject.

The complaint charges that the defendants conspired to restrain trade and commerce in gypsum board by concerted-ly raising and fixing at arbitrary and non-competitive levels the prices of gypsum board manufactured and sold by defendants (Compl. Par. 45(a); R. 10); that USG has circulated among its licensees numerous bulletins setting forth prices and terms and conditions of sale for gypsum board; that USG, through its officers, employees, attorneys, and a corporation known as Board Survey, Inc., has enforced ad-

herence by the licensees to said bulletin prices and has investigated and policed alleged violations thereof; and that the licensees frequently have filed complaints with USG of alleged violations of bulletin prices by other licensees and USG has, through the aforesaid agencies, regularly investigated said complaints (Compl. Par. 90, 92, R. 23-25).

These charges were specifically denied in defendants' answers (e.g., R. 275, 289, 290) except that it was admitted that USG has determined and established by price bulletins the minimum prices at which a licensee might sell patented gypsum board made by it and licensees have sold a substantial part thereof at prices not less than the minimum so determined.

In the proposed findings here under consideration, plaintiff would have the Court find that defendants have participated in either the formation or the activities of Board Survey, as stated in proposed finding 133, upon the basis of three incomplete and erroneous subsidiary findings (proposed findings 130-132) designed to establish that USG and its licensees, upon the formation of Board Survey, acted in concert under a plan to police violations of the provisions of the price bulletins.

This Court in its opinion carefully considered the evidence with respect to Board Survey and its activities and concluded in its opinion and in its findings that USG set up as a department a wholly owned corporation called Board Survey, Inc., the function of which was to receive complaints of license violations, investigate the facts, call them to the attention of the licensee involved and occasionally to the attention of the licensor; that it was formed for the purpose of bringing about compliance with the licenses; that the licensees had no part in its formation, management or operation; and that the enforcement of the licenses by USG and its agency as valid and binding contracts, affirmatively evidence good faith with respect thereto (D. C. Op., R. 3946-47, 4033-34, FF. 20, 35, R. 4143-44, 4149). It further appeared from the evidence that Board Survey 12681 became inactive in 1937, several years before the filing of the complaint in this case (R. 2841).

In addition, defendants offered to prove (par. 53) and the licensees had no part in the formation, management or operation of Board Survey; that its formation, management and operation by USG were not the result of any agreement or understanding among the defendants; that the operations of Board Survey were confined to efforts to

insure compliance with the licenses and price bulletins and were undertaken solely to protect the rights of USG under the license agreements and patents; and that its activities were so limited.

Proposed finding 133 would have this Court find that "The defendants have participated in either the formation or the activities of Board Survey * * *." This Court, on the same evidence now before it, found the exact opposite when it held that "The licensees had no part in its [Board Survey's] formation, management or operation" (FF. 20, R. 4143-44). The Government did not even assign error to that finding.

Proposed findings 130-132 recite that Board Survey, Inc. was set up by USG for the purpose of enforcing the license agreements; that the licensees were invited to, and did, report to Board Survey, Inc. violations of the price provisions and violations of other "regulations" in the bulletins; and that Board Survey, Inc. accordingly made investigations of the reported violations. As shown above, the bulletins contained only price provisions.

(21) PROPOSED FINDINGS 134-155 (LICENSEE MEETINGS AND PRICE BULLETINS)

This Court dealt with the aforesaid matters in its opinion (R. 3945-3947, 4033-4034) and made its findings with respect thereto (FF. 18, 20, 26-28, 33, 35, 98; R. 4143, 4147-49, 4163). Defendants made offers of proof (pars. 5, 49, 51 and 52) on the subject of Licensee Meetings and Price Bulletins.

The complaint charges that the defendants conspired to restrain trade and commerce in gypsum board by concertedly raising and fixing at arbitrary and non-competitive levels the prices of gypsum board manufactured and sold by defendants (Compl. Par. 45(a), R. 10); and that USG and its licensees have held numerous meetings at which the prices and terms and conditions of sale prescribed by USG in price bulletins and complaints of violations by licensees of said bulletin prices were discussed for the purpose of obtaining adherence by the licensees (Compl. Pars. 90-99, R. 23-25).

These charges were specifically denied in defendants' answers (*e.g.*, R. 275, 289, 290), except that it was admitted that USG determined and established by price bulletins the minimum price at which a licensee might sell patented gyp-

sum board made by it and licensees have sold a substantial part thereof at prices not less than the minimum so determined.

12682 *In the series of proposed findings here under consideration, plaintiff would have the Court find that, for the purpose and with the effect of eliminating competition in the gypsum board industry, defendants have held licensee meetings and have adopted and followed the provisions of the price bulletins, as stated in proposed findings 154 and 155, on the basis of twenty subsidiary findings (proposed findings 131 through 153) designed to establish that defendants had entered into a plan or agreement to eliminate such competition, that they had, at licensee meetings in the summer of 1929, traded out the terms and conditions which were later incorporated in the November, 1929, licenses and had concertedly worked out the details of the distribution system established under the licenses. These proposed findings are contrary to the evidence and contrary to the prior findings of this Court.*

This Court gave careful consideration to the license bulletins and to the subject matter of the licensee meetings, reviewing the testimony of the witnesses and the documentary evidence introduced by the Government with respect thereto. As a result, this Court concluded in its opinion and in its findings that the minimum price bulletins were sent out by USG to establish the minimum price at which the licensee might sell the patented board manufactured by it; that the price bulletins contained two classes of provisions, one providing how the price should be arrived at, the other intending to protect the price fixed, i.e., to prevent indirect price-cutting in the sale of the patented product; that there was at no time any understanding or agreement or even discussion as to what the prices of gypsum board would be upon the execution of the licenses and that, after the execution of the licenses, the licensees had nothing whatever to do with fixing the minimum prices at which the patented products were to be sold; that the defendants did not by any of their operations under the license agreements, nor did they by any agreement or understanding, illegally raise or fix at arbitrary or non-competitive levels the price of gypsum board as charged by the Government; that from time to time a representative of USG as licensor met with representatives of the licensee companies for the purpose of explaining to them the provisions of the minimum price bulletins and for the purpose of securing adherence to such minimum prices by the licensees; and that such meetings

of USG with its licensees affirmatively evidence good faith and showed that the licensor and licensees regarded the license agreements as valid and binding (D. C. Op., R. 3946-47, 3987-91, 4033-34; FF. 18, 20, 26-28, 35, 58-59, 87, 98, R. 4143, 4147-49, 4155, 4161, 4163). The record shows that there has been no licensee meeting since March, 1937 (R. 2942).

Moreover, the defendants offered to prove (pars. 5, 49, 51, 52) that the sole interest of USG in the enforcement of its patent license agreements was to secure to itself the full benefits of its patents and not to enter into any plan or scheme to stabilize the gypsum industry; that the 12683 matter of establishing the minimum price for gypsum board under the patent license agreements was at all times for the sole determination of USG; that all of the provisions of the price bulletins with respect to terms and conditions of sale had direct relation to the price fixed by the licensor and were not promulgated for the purpose or with the effect of regulating the industry, but solely for the purpose of defining the minimum prices fixed by USG and providing for the maintenance thereof; and that the rebate provisions of the price bulletins were issued solely for the assurance of maintenance by the licensees of the minimum price fixed by USG and protecting it against indirect reductions by means of secret rebates made for the purpose of reducing the price charged for patented board by the licensees below the minimum price.

Proposed finding 134 would have this Court find that beginning with June 6, 1929 and down to March 17, 1937, eighteen licensee meetings were held which were "customarily attended" by all the defendants except Texas. There is no evidence to support this statement, nor is it a fact.

Proposed finding 135, referring to the licensee meetings held during the summer of 1929, would have this Court hold that the manufacturers met and traded out the terms and conditions which were later incorporated in the November 1929 license agreements. There is nothing in the record to support this statement. Moreover, defendants offered to prove (par. 37) that the November, 1929, licenses were separately and independently negotiated and entered into between USG and each of the licensees, and that there were no agreements or understandings of any kind with USG to issue identical licenses to the licensees upon the condition that they or any two or more of them

would accept such licenses or that other members of the industry would take similar licenses.

Proposed finding 136 would have this Court find that: "What the board manufacturers actually did at these meetings was to work out, concertedly, the details of the distribution system which had been established generally under the license agreements. Some of these were later incorporated into price bulletins and became the written law of the industry." There is nothing in the record to support these statements and they are contrary to this Court's findings to the effect that the licensee meetings were for the purpose of explaining to the licensees the minimum price provisions and for the purpose of securing adherence to such minimum prices by the licensees, and that the enforcement of the license provisions through the meetings affirmatively evidenced good faith and showed that the licensor and licensees regarded the license agreements as valid and binding (FF. 20, 35; R. 4143, 4149).

Proposed finding 137 would have the Court find that at the meeting of June 6, 1929, it was determined that mail order houses, house wreckers and the Federal Government were to be classified and sold as dealers and, as stated in finding 136, were later incorporated into price 12684 bulletins and became the written law of the industry. There is no charge in the complaint of any such violation, nor is there any evidence in the record to support any such charge, as it is perfectly clear that USG independently exercised its right to establish the minimum prices in its license bulletins without consultation with anyone (R. 4053).

Proposed finding 138 would have the Court find that the so-called jobber regulation presented a recurring problem and was discussed at a number of meetings commencing as early as June 6, 1929. The fact is that the jobber question presented no particular problem until after August 8, 1930, when questions arose as to violations of the price bulletin of that date making the jobber and dealer price the same (R. 2506, 2667, 2897). At the meeting of June 6, 1929, the only discussion as to jobbers was with respect to the list of jobbers under the old license agreements, and at the other meetings mentioned, the only discussion about jobbers was with respect to sales at special discounts in violation of the minimum price.

Proposed finding 139 would have the Court find that the licensees, at the October 17, 1932, meeting were afforded an opportunity to have the price control feature eliminated

from the licenses or at least to express their opposition to price control. This is an erroneous interpretation of what took place at the meeting. The fact is that the attention of the licensees was called to violations of the minimum price bulletins as shown by their respective audits, and counsel for USG stated that if the licensees continued to violate the terms of their license agreements as shown in these audits, then USG had only three alternatives: (1) to cancel the licenses for breach, (2) to sue the licensee for damages for infringement, or (3) to withdraw the minimum price bulletins. There was no discussion at the meeting as to what was to be done nor were the licensees afforded any opportunity at all as stated in the finding (R. 2603-4).

Proposed finding 140 would have the Court find that at the meeting of October 17, 1932, USG not only took the position that the employment of commission salesmen was a bad practice and should be discontinued, but that the defendants at this meeting agreed to discontinue the employment of commission salesmen. There is no foundation for this in the record. With respect to commission salesmen there was a practice in the industry to cut the price of the patented board by paying commissions to a salesman who would in turn split his commission with the customer, the effect of which was to reduce the price of the board (R. 2853-4). That was all that was discussed at the meeting of October 17, 1932, and the license bulletin which followed was intended to prevent that practice and was so understood by the licensees (R. 2857). This, together with other price concessions, was covered by a later bulletin dated February 6, 1939, to the effect that any sale of patented products, though ostensibly made at the minimum price, would be considered a violation if 12685 the licensee reduced the price below the minimum by granting rebates including the splitting of salesmen's commissions with customers (R. 100). This Court held in its opinion that that bulletin was a price protective provision and proper in a patent license, and that the evidence in the case failed to establish that in operation that provision was used illegitimately, that is, to raise, maintain and stabilize the price of unpatented materials (D. C. Op. R. 4079-80). Furthermore, the Court made a finding to that effect. (FF. 95, R. 4162). The splitting of commissions was a deliberate rebate from the minimum price and whenever the subject was discussed at a meeting or dealt with in a bulletin it was clearly understood that

the licensor's position was that a reduction of the minimum price by splitting commissions was a license violation. The Court recognized this situation in its finding that the license bulletins contained provisions purposed to prevent the violation of the minimum price requirements through such devices, in connection with the sale of board, as the "splitting of commissions with the customer by commission salesman" (FF. 18, R. 4143). This Court, in its opinion, in approving the bulletin provisions with respect to indirect price-cutting, said that the provisions in the General Electric-Westinghouse license and in the licenses in the instant case in respect of indirect price-cutting, *i.e.*, the price restrictive provisions including those which relate to commission salesmen, are of similar character (R. 3991).

Proposed findings 141, 142, 143 and 144 would have the Court find that the board manufacturers, at their meetings, agreed to the bulletin provisions treating excess dunnage as an indirect means of granting a rebate on the minimum price and that it was improper to provide against this in the indirect price-cutting provisions of the bulletins. Dunnage was board used to properly pack a shipment and the practice arose among the licensees to put in a large amount of board ostensibly as dunnage but for the sole purpose of giving the customer additional board by way of a rebate on the minimum price (R. 2659-60). This practice was the subject matter of license bulletins issued by the licensor and when discussed at meetings simply represented a complaint by the licensor that over-shipment of patented products in this way constituted a violation of the minimum price bulletin. Finally, the subject matter was covered by the bulletin of February 6, 1939, wherein it was provided that any sale of patented products, though ostensibly made at or above the minimum price, would nevertheless be considered a violation if the licensee, directly or indirectly, reduced the price charged below the minimum price by granting the customer rebates by including board under the guise of dunnage or by making any other payment or allowance in the form of money or otherwise which had for its purpose and effect reducing the price charged by licensee below such minimum price (R. 100). This was recognized by the court when it found that the bulletins contained provisions purposed to
 12686 prevent the violation of the minimum price requirements through such devices, in connection with a sale of board, as the giving away of board as "dunnage" (FF. 18; R. 4143).

Proposed findings 145, 146, 147 and 148 deal with indirect price-cutting through extending other than regular terms to dealers, accepting other mediums of payment which represented value less than the full purchase price, and making bids by deducting the discount for cash in the bid. Plaintiff seeks to imply that there were agreements made at these meetings with respect to practices in the industry, such as an agreement not to allow longer terms than had prevailed in the gypsum industry from its beginning, an agreement not to deduct the cash discount in making bids, and an agreement not to take payment in other than cash. The fact is the discussion involved complaints made by USG of indirect price-cutting by these very methods and there is no foundation for the statement that agreements were made with respect to any of these matters.

Proposed finding 149 would have the Court find that bulletins regarding warehouses at dealers' places of business and consigning stocks were intended to eliminate both types of competition and place the entire industry on a "regular terms basis." Practices had grown up in the industry where indirect rebates were given by establishing warehouses at dealers' places of business and by consignment of stocks, and bulletins were issued by the licensor to the effect that any indirect relating by such methods would be regarded as a violation of the minimum price. Finally, the entire subject of indirect relating was covered by the bulletin of February 6, 1930 (cancelling all prior bulletins) to the effect that any sale of patented products, though ostensibly made at or above the minimum price established by the licensor, would nevertheless be considered a violation if the licensee, directly or indirectly, reduced the price charged below the minimum price by granting the customer rebates or by making any other payment or allowance in the form of money or otherwise which has for its purpose and effect reducing the price charged by licensee below such minimum price (R. 100). There never was any agreement or understanding, nor did any of the earlier bulletins have the effect of eliminating any type of competition except competition with respect to the minimum price at which the patented board was to be sold by the licensee.

This Court recognized the effect of these bulletins when it said in its opinion that the bulletins contained provisions purposed to prevent the violation of the minimum price requirements through such devices, in connection with the

sale of board, as the giving away of board as dunnage, making advertising allowances to the customer, granting of fictitious damage claims, splitting of commissions with the customer by commission salesmen, paying of unearned warehousing charges, fictitious hiring of customers' trucks, giving away of plaster or other products or

12687 the sale of such products at a price unusually below the prevailing market price (R. 3945). Furthermore, the Court embodied this in its findings of fact (FF. 18, R. 4143): The Court further found that the price protective provisions related only to minimum prices established on patented products and were designed solely to protect such prices (FF. 26, R. 4147).

Proposed finding 150 contains an inaccurate and confusing statement of practices violating the minimum price provision which had arisen in connection with deliveries to the job site, which constituted a rebate to the dealer in the form of additional services rendered in connection with the sale of the patented board. There is nothing in the record to support the view that the parties agreed to any limitation or regulation with respect to these practices as proposed finding 150 would imply. On the contrary, this Court expressly found that the licensees had nothing whatever to do with fixing the minimum prices at which the patented products were to be sold (FF. 59, R. 4155). It was merely another instance of the licensor calling to the licensees' attention a practice of rebating in the sale of patented board which violated the minimum price provisions of the license bulletins. The statement in the finding that subsequent bulletins restricted the licensees to the use of their own trucks or those of independent truckers and that dealers' trucks could not be hired, is lifted from the Government's brief (p. 145) and is not sustained by the record reference made with respect thereto.

Proposed findings 151, 152 and 153 purport to deal with rebate practices arising out of buying advertising matter from dealers, painting dealers' fences or signs, decorating their offices, making donations to dealers' ball club, donation of carpenter's aprons or sale of such below cost, and concessions of like nature. The record does not support the inference that these proposed findings seek to create that the correction of these license violations were arrived at by agreement of the parties at licensee meetings or otherwise. On the contrary, it merely shows that these were other indirect methods of violating the minimum price provisions of the license bulletins, which the licensor

called to the attention of the licensees. The subject matter was covered by the license bulletin of February 6, 1939, prohibiting sales of the patented product at less than the minimum price through rebates, allowances, etc. by making any payment or allowance in the form of money or otherwise which has for its purpose and effect reducing the price charged by the licensee below the minimum price (R. 100).

Furthermore, this type of rebating was specifically considered by this Court in its opinion when it said that the Government introduced evidence of alleged violations of the minimum price on the patented board "by means of such devices as free painting of signs, sales of company stock below the market price, donations to a ball club and receiving payments for board in certificates of deposit rather than in legal tender." The Court found that the investigations with respect to such matters were to prevent the licensee involved from violating its license contract by selling the patented board manufactured by it at a price below the minimum price therefor established by the licensor, and further found that such items are not embraced within the charge of the complaint (FF. 98, R. 4163-4). The Government did not even assign error as to this finding and it is in no position to ask this Court now to make findings inconsistent and in conflict therewith.

(22) PROPOSED FINDINGS 156-61 (INSPECTION OF BOOKS)

This Court in its opinion referred to the license provisions requiring licensees to keep books and records and authorizing examination thereof, and concluded that all of the license provisions compared favorably with those contained in the license agreements in the *General Electric* case and were reasonably adapted to secure to USG the pecuniary reward for its patents (D. C. Op., R. 3938, 3987-91). Findings were made to that effect (FF. 8, 27, 28; R. 4135-36; 4147-48). Defendants made an offer of proof (para. 48) on this subject.

The complaint charges that the defendants conspired to restrain trade and commerce in gypsum board by concertedly raising and fixing at arbitrary and noncompetitive levels the prices of gypsum board manufactured and sold by defendants (Compl. Par. 45(a); R. 10); that USG has required its licensees to make regular reports of all sales of board by its licensees and to permit USG to audit the books of the licensees from time to time to enable USG to enforce its bulletin prices; and that USG and its licensees have held

numerous meetings at which complaints of violations by licensees of said bulletin prices were discussed for the purpose of obtaining adherence by the licensees to said bulletin prices (Compl. Par. 90-92, R. 23-25).

The defendants in their answers denied all of said charges except that they admitted that during said period USG fixed the minimum prices of the licensees for patented board and issued bulletins covering said prices, and that the licensees in the main adhered to said bulletin prices (*e.g.*, R. 289-290).

In the series of proposed findings here under consideration, plaintiff would have the Court find that USG's right to examine the books of its licensees, its exercise of that right and its communications to licensees with respect thereto at meetings and in correspondence, facilitated the elimination of competition in the gypsum board industry, as stated in proposed finding 161, in the basis of five subsidiary findings (proposed findings 156 through 160) designed to establish, by an erroneous and misleading statement of facts, that defendants entered into a plan of concerted action to facilitate the elimination of competition through USG's inspection and audit of books and records of licensees. These proposed findings are wholly unsupported by the evidence.

12689 These proposed findings are presumably predicated upon Lenci's testimony that, following the first audits, USG called its licensees' attention to violations disclosed thereby at a licensee meeting in the fall of 1932. As hereinbefore shown, this Court considered that evidence and concluded in its opinion and in its findings that USG's purpose in bringing these violations to the licensees' attention was solely to explain to them the provisions of the minimum price bulletins and to secure adherence thereto by the licensees; and that defendants did not by any of their operations under the license agreements, nor did they by any agreement or understanding, illegally raise or fix at arbitrary or noncompetitive levels the prices of gypsum board as charged by the Government (D. C. Op., 3946-47, 4033-34; FF. 20, 35, 58, 59, 87; R. 4143-44, 4149, 4955, 4961).

Furthermore, the defendants offered to prove (par. 48) that the provisions in the license agreements to the effect that the licensees' books of account were open to the licensor, were not inserted in the licenses for the purpose of maintaining industry-wide license agreements, but for the purpose of protecting the licensor, on the one hand, and the licensee, on the other, with respect to those matters and things common to entering into such contractual relations.

The right to inspect the books and records of licensee was limited in the licenses to those books and records relating to patented board manufactured and sold by licensee, and the licensee had the right to require that the examination be made by a certified public accountant (R. 76-77).

Proposed finding 156 would have this Court find that the licenses contained a clause giving USG the right at any time to inspect the books of its licensees, which clause gave USG the power to check on its licensees with respect to any possible variation from the prices and terms and conditions of sale contained in the price bulletins. The statement is inaccurate in that the license agreement expressly provided that the licensee had the right to require that any examination of its books and records be made by a certified public accountant.

Proposed finding 157 would have the Court find that USG has inspected the books and records not only to determine the proper amount of royalties but also to determine whether the licensees observed the prices and "regulations" concerning the sale imposed by the bulletins. The fact is that many of the audits were made by certified public accountants. Furthermore, no examination was made except to verify the royalty payments, and compliance with the minimum price provisions of the license bulletins. Plaintiff refers to "regulations" for the purpose of implying that there were regulations other than price, wholly contrary to the evidence in the case and the findings of this court.

Proposed findings 158 and 159 would have the Court find that after the audits were made the results disclosing the violations were called to the attention of the 12690 licensees both at meetings and by correspondence.

The only time audits showing violations of the terms of the bulletins were discussed at the meetings, was at the meeting of October 17, 1932, following the first audit which was made. The suggestion that there was a regular practice of taking up the audits and violations disclosed therein at meetings of the licensees is inaccurate.

(23) PROPOSED FINDINGS 162-163 (AGREEMENT TO BLANKET INDUSTRY)

The subject of the alleged plan to blanket the industry is dealt with by this Court in its opinion (R. 4101-17) and the Court made numerous prior findings with respect thereto (FF. 29-40, 118; R. 4148-4167). Defendants' offers of proof (pars. 1-5, 15, 17, 18, 46-50, 62) deal with this subject.

The complaint charges that the defendants are parties to contracts to restrain trade and commerce in gypsum board by concertedly raising and fixing at arbitrary and noncompetitive levels the prices of gypsum board manufactured and sold by defendants; that the combination was entered into and carried out in part under the guise of numerous license agreements under patents owned by the defendant USG and that to give color of legality to the combination the defendants concertedly agreed among themselves to enter into and did enter into said license agreements which were not *bona fide* but entered into for the legal purposes described in paragraphs 44 and 45 (Compl. Pars. 44-6, R. 9-11); that the alleged conspiracy involved agreements among the defendants which were within the traditional prohibitions of the Sherman Act (Compl. pars. 47-88, R. 11-22) and involved the charges that the conspiracy had its foundation in an agreement among Avery, Blagden and Griswold that efforts should be made to induce the industry to enter into license agreements with USG having for their purpose long-term price-stabilization of the board industry, that Blagden and Griswold agreed to act as liaison between USG and the industry for this purpose, and that upon the revival of this plan in 1928 Holland agreed with Avery to promote it (Pars. 58, 74, R. 13, 17); that USG has determined and by price bulletins issued by it fixed the selling prices and the terms and conditions of sale of its licenses of all gypsum board manufactured by them and that they have adhered to such prices and terms and conditions of sale; that pursuant to the agreements described in paragraphs 76 and 85 of the complaint USG raised, stabilized and maintained the prices of gypsum board at high, arbitrary and noncompetitive levels (Compl. Par. 90-1, R. 23).

The defendants, in their answers, denied all of said charges except that they admitted the execution of said license agreements and that USG fixed the prices thereunder pursuant to the terms thereof and that they in the main adhered to said price bulletins (*e.g.*, R. 275, 289, 290).

12691 *In the conclusional findings here under consideration, plaintiff would have the Court find that defendants associated themselves in a plan to blanket the gypsum board industry under patent licenses and stabilize prices, as stated in proposed finding 162, and that the various alleged restraints and monopolization of trade were made possible and resulted from concentration of board manufacturing facilities in the hands of defendants and cooperation among*

the defendants to suppress competition in order to organize the gypsum industry and stabilize prices, as stated in proposed finding 163. These proposed findings are contrary to the evidence and contrary to the prior findings of this Court.

• The evidence on this phase of the case is dealt with extensively in this Court's opinion and in its findings. Thus, at the outset, the Court reviewed the historical facts with respect to the parties, the industry, the product, the patent development and litigation arising in connection therewith, the settlement of the litigation, the negotiation of the licenses and in a general way the operations thereunder (D. C. Op., R. 3934-47). After reviewing the testimony of Griswold, Blagden, Holland and others regarding the negotiations for the licenses and the documentary evidence introduced with respect thereto, the Court concluded that the license agreements were executed at arm's length; that they were *bona fide* agreements intended to bind each party to the terms thereof and not sham agreements executed to disguise illegal purposes; that the licensees took their respective licenses without regard to what other companies did; and that the license agreements were not executed with intent to gain objectives beyond the limits of any patent monopoly (R. 4028-72). The Court dealt specifically with the Government's asserted "plan to blanket the industry under patent licenses" and reviewed the 21 specific items of evidence which the Government particularly relied upon in support of its claim, in which consideration the Court assumed *arguendo* that the declarations were binding upon all defendants and after considering each item of evidence in the light of all the evidence, the Court concluded that the Government had failed to prove that there was any agreement among the defendants to associate themselves in a plan to blanket the industry and stabilize prices (D. C. Op., R. 4101-17). This Court made findings of fact incorporating the conclusions of its opinion with respect to these charges (FF. 5-15, 24, 29-53, 118, R. 4133-41, 4145, 4148-54, 4167).

Although the Supreme Court in its opinion rejected this Court's Finding 118, it did not disturb the numerous findings of this Court establishing the *bona fide* character of the license agreements. The fact that the Court rejected Finding 118 and remanded the cause for further proceedings does not require this Court to make a finding of fact directly contrary to its prior finding made on the same record. Furthermore, the defendants have offered to prove (Pars. 1 and

2) the reverse of the above quoted propositions contained in proposed findings 162 and 163, i.e., that there was 12692 not any agreement or understanding among USG and the other defendants or any of them that they would associate themselves in a plan to blanket the industry under patent licenses and stabilize prices and organize the industry or issue or cause to be issued substantially identical licenses to all of the defendants or any number of them (See also pars. 3-5, 15, 17, 18, 46-49, 62). The defendants were not permitted to adduce their evidence pursuant to those offers.

Proposed finding 162 would have this Court find that, since the execution of the last four of the 1929 licenses, competition at the price, quality and service levels has been eliminated in the industry. There is no support for this finding in the record.

Proposed finding 163 would have this Court find that undue and unreasonable restraints and monopolization were in part made possible and resulted from (a) all the manufacturing facilities for board being concentrated in the hands of a few manufacturers, and (b) the attitude of the present defendants since at least 1929 has been that of mutual cooperation to suppress competition in order to organize the gypsum industry and stabilize prices. This Court has not found that there were any undue and unreasonable restraints and monopolization as stated, nor could it so find upon the record of this case, as shown heretofore in this memorandum. That the attitude of the present defendants has been of mutual cooperation to suppress competition in order to organize the gypsum industry and stabilize prices likewise has no support whatsoever in the record and is contrary to the prior findings of this Court.

(24) PROPOSED FINDINGS 164-165 (ACQUISITIONS)

Proposed findings 164 and 165 would have this Court find that the acquisition by any defendant of the manufacturing facilities for board or other gypsum products of any manufacturer thereof through consolidation, merger, purchase, lease or by other means will facilitate restraints and monopolization which would be detrimental to the public interest and would collide with the Sherman Act's protection of the public from evil consequences.

There is no charge of any such kind in the complaint and no evidence in the record to support it. Neither the plaintiff nor the defendants in their briefs nor this Court in its opinion covering the entire case mentioned or referred to any such charge.

Proposed finding 164 asserts that USG, National and Certain-teed have attained their present size in part through consolidation, merger or purchase of competitors' gypsum manufacturing facilities, with respect to which there is no charge in the complaint as above shown. There is no evidence to support any finding that the consolidations, mergers and purchases referred to were in any way unlawful.

12693 B. Conclusions

Taking up plaintiff's proposed Conclusions of Law in the order stated by it, we make the following specific objections, in addition to the general objections heretofore stated:

(1) PROPOSED CONCLUSION 2

The statement in proposed Conclusion 2 to the effect that a conspiracy has been established by independent evidence might refer either to the alleged "conspiracy extrinsic to the plurality of licenses," or to the "combination by plurality of licenses." It was the latter the Court condemned upon the motion for summary judgment when it held that the defendants acted in concert by adhering to the price provisions of the patent licenses. The statement that all the declarations and acts of the several conspirators became admissible against the others is an inaccurate statement of the rule which admits only those declarations or acts in furtherance of the conspiracy. The declarations with respect to the early negotiations for the licenses have no bearing on the determination made upon the motion for summary judgment, as they were offered with respect to the alleged "conspiracy extrinsic to the plurality of licenses."

(2) PROPOSED CONCLUSION 3

The assertion in proposed Conclusion 3 that every act in furtherance of a general plan to restrain or monopolize trade is illegal regardless of its legality when standing alone is apparently intended to lay a foundation for a sweeping injunction against all kinds of lawful practices. The statement of the rule is incomplete and therefore misleading.

(3) PROPOSED CONCLUSION 4

It is stated in proposed Conclusion 4 that the material consideration in determining whether a monopoly exists is

not that prices are raised and competition actually excluded, but that power exists to raise prices or exclude competition and that intent so to do is present. The statement is incomplete; for in a conspiracy to monopolize under Section 2, it must appear that the conspiracy is formed with power to control and dominate interstate trade and commerce and that the conspirators are able as a group to exclude actual or potential competition from the field, accompanied with the intention and purpose to exercise such power. An essential element of the offense is the existence of the combination or conspiracy to acquire and maintain the power to exclude competitors to a substantial extent. The group must not only have the power to exclude but they must have the intent and purpose to exercise that power, which later must be shown as a necessary element of the conspiracy.

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(4) PROPOSED CONCLUSION 5

Proposed Conclusion 5 would have this Court overrule the decision of the Supreme Court in the *General Electric* case—which the Supreme Court itself has thus far refused to do.

(5) PROPOSED CONCLUSION 6

In proposed Conclusion 6 the statement that concerted action to control prices and distribution by means of patent license agreements constitute a violation of the Sherman Act, is altogether too broad to be accepted as a conclusion of law. To say that a patentee must give consideration to the limitations of the Sherman Act or that the courts are required to balance the privileges under the patent grant against the prohibitions of the Sherman Act, is not a legal conclusion but an argumentative statement.

(6) PROPOSED CONCLUSION 7

The statement in proposed Conclusion 7 that patents grant no privileges to their owners of organizing the use of their patents to restrain trade and monopolize an industry through price control, through royalties for patents drawn from patent-free industry products, and through regulation of distribution, is but an effort to imply that patents of other owners were combined for the purposes stated, contrary to the evidence in the case and the prior findings of the Court. If plaintiff is referring only to the use by USG of its patents, the statement is not supported by the evidence and is contrary to the prior findings by the Court. It is improper in this case to ask the Court to accept any

such conclusion on either theory where there is no such abuse of patent privileges shown by plaintiff's evidence. Furthermore, upon the motion for summary judgment, defendants have been denied the right to introduce evidence to the contrary. The ambiguity in the statement is sufficient in itself to warrant its rejection.

(7) PROPOSED CONCLUSION 8

In proposed Conclusion 8 the statement is made that where a patentee acting in concert with all members of an industry issues substantially identical licenses under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, resale prices of another class fixed, and prices of unpatented products stabilized, such conduct constitutes a violation of the Sherman Act and the doctrine of the *General Electric* case has no application. Plaintiff is not entitled to such a conclusion which presupposes the establishment of facts which are not only contrary to the evidence and prior findings of the Court, but raise controversial issues denied in the answers 12695 and with respect to which defendants were deprived of the right to introduce their evidence. In fact, this is but an argument to support plaintiff's position on all of the controversial issues in the case notwithstanding the fact that upon its motion plaintiff rested its position solely upon the theory of concert of action among the defendants in adhering to the price provisions of the patent licenses, even though each license was assumed to be legal when made, and obtained its judgment on that ground.

(8) PROPOSED CONCLUSION 9

In proposed Conclusion 9 plaintiff would have the Court hold that the *General Electric* case applies only where the patentee licenses a single licensee with price limitation, and where there is no conspiracy to restrain or monopolize. The opinion of the Supreme Court, as construed by this Court upon the motion for summary judgment, limited the doctrine of the *General Electric* case only in a situation in which there was concert of action among competitors in an entire industry. Furthermore, the evidence does not warrant the inference that defendants conspired to enter into patent licenses for the purpose of fixing prices and that each license was made in furtherance of any such plan, which inference is contrary to the prior findings of this Court. The Court should not be asked to make any such conclusion.

(9) PROPOSED CONCLUSION 10

Proposed Conclusion 10 would have this Court conclude that two or more competing patents may not be combined for the purpose or with the effect of obtaining price control on the products manufactured under any of them; and that the merging of patents in order to obtain the benefits of price-fixing restrains trade in the same way as the fixing of prices of unpatented goods. Such a conclusion has no application to any issue in this case. No such charge was made in the complaint, nor is there any evidence in the case to support it. The statement that when USG took over the starch patents from Universal, combined them with the Roos foam applications and licensed the industry under both with price control, its conduct constituted a violation of the Sherman Act, is not warranted by the evidence. The evidence showed, and this Court found, that the starch patent was purchased by USG in settlement of a claim for infringement by Universal and to avoid further infringement. Furthermore, defendants offered to prove not only that there was no illegal purpose in acquiring the starch patents, but that there was no understanding or agreement among the defendants with respect thereto. The proposed conclusion is clearly improper.

(10) PROPOSED CONCLUSION 11

Plaintiff would have this Court find by proposed Conclusion 11 that the defendants entered into common 12696 price-fixing patent license agreements for the purpose of organizing the industry and stabilizing prices in violation of Sections 1 and 2 of the Sherman Act. The evidence failed to establish that the defendants entered into any such plan or agreement for the purpose of organizing the industry and stabilizing prices, as we have shown in our objections to the proposed findings of plaintiff in this same connection. The charges made in the complaint in this respect were denied in the answers, offers of proof were made in support of those denials, and this Court found in its prior findings that no such agreements had been entered into. It follows that there is no support in the record for a finding that agreements of that kind constituted a violation of the Sherman Act.

(11) PROPOSED CONCLUSION 12

In proposed Conclusion 12 plaintiff would have this Court find that the defendants, in carrying out the con-

tinuing combination and conspiracy referred to in Conclusion 11, in violation of the Sherman Act, concertedly, raised and fixed at arbitrary and non-competitive levels the price of gypsum board, standardized gypsum board and its method of production and distribution, attempted to raise and stabilize the general level of prices for plaster and miscellaneous gypsum products, eliminated jobbers, attempted to fix the resale prices and terms and conditions of sale of manufacturing distributors, and excluded Cardiff Gypsum Company from access to a source of supply of board. This conclusion is based upon plaintiff's proposed findings of fact 66 to 72 with respect to prices, 73 to 91 with respect to standardization of board, 92 to 96 with respect to plaster prices, 97 to 105 with respect to jobbers, 106 to 114 with respect to resale prices of manufacturing distributors, and 115 to 119 with respect to alleged exclusion of Cardiff from the gypsum market, which as we have shown are not worthy in whole or in part of acceptance as findings of fact for the reasons set forth in our objections thereto in this memorandum. The Court in each case, except as to the last item, found that the evidence did not support the charges made in the complaint. As to the last item, there is no charge in the complaint that Cardiff was excluded, nor is there a scintilla of evidence in the record to support such a charge. The suggested conclusion has therefore no support in the record.

(12) PROPOSED CONCLUSION 13

In proposed Conclusion 13, plaintiff would have the Court find that the defendants, in violation of Sections 1 and 2 of the Sherman Act, in carrying out the alleged activities referred to in proposed Conclusion 12, observed and followed the prices, terms and conditions of sale prescribed in the price bulletins relating to gypsum board, held licensee meetings to work out the details of the distributive system established under the license agreements, organized 12697 Board Survey or participated in its policing activities to assure uniform industry prices, limited the manufacture of board to uniform methods, and inspected the books and records of licensees or had them inspected in aid of the conspiracy. It is important to note that each of these charges is tied in to the charge in proposed Conclusion 12 of a continuing conspiracy referred to in proposed Conclusion 11, wherein the so-called continuing conspiracy is in turn described as a plan to enter into common price-

fixing patent license agreements for the purpose of organizing the industry and stabilizing prices. The acceptance of the conclusion, as it is stated by plaintiff, would necessarily imply that all of the charges made in the complaint of a "conspiracy extrinsic to the plurality of licenses" had been conclusively established by the evidence. In view of the fact that plaintiff's evidence fails to prove these charges, as found by this Court in its prior findings, and that they are all denied in the answers of the defendants and proof was offered to contradict them, there is no basis in the record for the acceptance of any such conclusion. Furthermore, the conclusion is another way of restating the same findings suggested by the plaintiff in its proposed Findings of Fact 66 to 72 as to prices and 134 to 155 as to licensee meetings and price bulletins; 130 to 133 as to Board Survey, Inc.; 73 to 88 as to types and sizes of board; and 156 to 161 as to inspection of books, which either in whole or in part we have shown are not supported by the evidence.

(13) PROPOSED CONCLUSION 14

In proposed Conclusion 14 plaintiff would have the Court find that the license agreements relating to board, metallized board and perforated lath are illegal contracts in restraint of trade or commerce, in violation of the Sherman Act. In a series of proposed findings of fact 16 to 65 entitled "The Conspiracy" and covering every controversial charge made in the complaint and denied in the answers, all as shown in our objections to said findings, plaintiff sought to establish the illegality of the board licenses on the ground that they were a part of a conspiracy extrinsic to the plurality of licenses. In addition thereto, in a series of proposed findings of fact 56 to 59, it particularly sought to establish the illegality of the metallized board licenses on the ground that they were executed pursuant to an arrangement that only USG and National would manufacture metallized board and the other licensees would buy the board from them and maintain the resale price thereof. Plaintiff likewise, in a series of proposed findings of fact 60 to 65, particularly sought to establish the illegality of the perforated lath licenses on the ground that they were entered into simply to give color to an agreement to fix prices. We showed in our objections that these proposed findings of plaintiffs were inaccurate and not worthy of acceptance; that they dealt with controversial issues denied in the answers; and that they were not established

12698 by the evidence, as found by this Court in its prior findings. We submit that upon the present state of the record it is improper for plaintiff to ask the Court to conclude that all of the license agreements relating to board, metallized board and perforated lath are illegal contracts in restraint of trade or commerce based upon findings of fact not supported by the evidence. In view of the determination upon the motion for summary judgment, it would be proper for the Court to conclude that the minimum price provisions of the patent licenses are illegal based upon the finding that defendants, in adhering to these provisions with knowledge of the adherence of the others, acted in concert to fix the price of gypsum board made and sold under the licenses.

(14) PROPOSED CONCLUSION 15

In proposed Conclusion 15 plaintiff would have this Court conclude that the defendants have monopolized the production, sale and distribution of gypsum board in the eastern area in violation of Section 2 of the Sherman Act. We have shown in our objections to plaintiff's proposed findings of fact covering this same subject that no such finding is warranted by the record, and we submit for the same reasons that no such conclusion is warranted. Furthermore, where plaintiff, as shown, has based the conclusion upon findings of fact wholly unsupported by the evidence and beyond the scope of the determination made upon the motion for summary judgment, the Court should not accept it.

(15) PROPOSED CONCLUSION 16.

In proposed Conclusion 16 plaintiff would have the Court conclude that defendants have suppressed competition in the gypsum industry at the price, quality and service levels in violation of Section 1 of the Sherman Act. This is based upon plaintiff's proposed findings of fact 66 to 161; the several groups of which taken together cover charges of a planned conspiracy from the beginning to fix prices and control the industry as alleged in the complaint, notwithstanding the fact that the charges are denied in the answers and plaintiff's evidence fails to establish them, as found in the prior findings of the Court. An examination of the several groups of these findings will show that they all cover controversial issues with respect to which defendants offered proof and were denied the right to introduce

their evidence. No blanket conclusion should be made based upon proposed findings which are not supported by the record and extend, as they do, far beyond the scope of the final determination made upon the motion for summary judgment.

(16) PROPOSED CONCLUSION 17

In proposed Conclusion 17 plaintiff would have this Court conclude that there is reasonable likelihood that the illegal restraints and monopolization practiced by the defendants will be continued and resumed unless the defendants
12699 are restrained, and an injunction issue which will effectively pry open to competition a market that has been closed by defendants' illegal restraints. This is a bid for a punitive decree based upon an erroneous view not only of the facts established in the case but of the scope of the determination made upon the motion for summary judgment. We submit that where the motion was granted upon the theory of concert of action in adhering to the price provisions of the license agreements, which the defendants, until the recent decision of the Supreme Court, had every reason to believe were valid under the patent laws of the United States, no such conclusion should be reached as requested by plaintiff.

Respectfully submitted

ALBERT R. CONNELLY

CRANSTON SPRAY

HUGH LYNCH

Attorneys for United States Gypsum

Company, Sewell L. Avery and

Oliver M. Knode

March 4, 1949

12700

Exhibit "A" to Memorandum

In the United States District Court
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; HENRY J. HARTLEY; and FREDERICK TOMKINS, DEFENDANTS.

DECREE

This cause came on for trial before this Court on November 15, 1943 and, at the end of the plaintiff's case, upon motion of the defendants pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, judgment was entered dismissing the complaint on its merits on August 5, 1946. That judgment was reversed by the Supreme Court of the United States, and the case was remanded to this Court for further proceedings in conformity with the opinion of the Supreme Court (333 U. S. 683).

This cause having now come on to be further heard upon the motion of plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment, in its favor upon the pleadings and all of the proceedings heretofore had herein, or, in the alternative, for such further proceedings as the Court might order; and the Court having considered the pleadings and all the proceedings heretofore had herein including, but not limited to, all exhibits and testimony of witnesses, admissions by counsel for the defendants, and the offers of proof submitted by certain of the defendants, having read and considered the briefs submitted by the respective parties, having heard and considered oral argument of counsel for the respective parties; and the Court having found that under the aforesaid opinion of the Supreme Court, as construed by it, the defendants, by adhering to the minimum price provisions of the patent license agreements, in an entire industry, with knowledge of the adherence thereto of the others, thereby

12701 acted in concert to restrain trade and commerce among the several states in the eastern territory of the United States and that there is no genuine issue as to any fact material to that finding;

Now, THEREFORE, upon motion of plaintiff, it is hereby ORDERED, ADJUDGED AND AGREED THAT:

Article I

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a cause of action against defendants under the Act of Congress of July 2, 1890, entitled "An Act To Protect Trade and Commerce Against Unlawful Restraints and Monopolies", commonly known as the Sherman Antitrust Act, and acts amendatory thereof and supplemental thereto.

Article II

As used in this decree:

1. "Defendant companies" shall mean all of the corporate defendants and Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company.

2. The "Patents" shall mean United States Letters Patent and applications for United States Letters Patent owned by defendant United States Gypsum Company which are described in the Patent Licenses, as hereinafter defined, and continuations in whole or in part, renewals, reissues, divisions, and extensions thereof.

3. "Gypsum board" shall mean plaster board or lath (including perforated and metallized lath) and wallboard (including metallized wallboard) made from gypsum and embodying any of the inventions or improvements set forth and claimed in any of the Patents.

4. "Minimum price provisions" shall mean and include: (a) any provision contained in a patent license agreement constituting an agreement, reservation of right, or license limitation with respect to the price or other terms or conditions of sale of gypsum board; and (b) any price bulletin or other notice or communication issued pursuant to any such provision.

5. "Patent Licenses" shall mean the patent license agreements which were in effect between defendants United States Gypsum Company and each of the other defendant companies at the time the complaint herein was filed and described in said complaint, namely, the following:

Agreement dated October 15, 1929, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee;

Agreement dated October 17, 1929, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee;

12702 Agreement dated October 18, 1929, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee;

Agreement dated November 5, 1929, between United States Gypsum Company, as licensor, and Universal Gypsum and Lime Company (National Gypsum Company, as Assignee), as licensee;

Agreement dated November 25, 1929, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee;

Agreement dated April 23, 1930, between United States Gypsum Company, as licensor and Kelley Plasterboard Company (Newark Plaster Co., as Assignee), as licensee;

Agreement dated February 10, 1937, between United States Gypsum Company, as licensor, and Texas Cement Plaster Company, as licensee;

Agreement dated October 5, 1934, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee (Metallized board);

Agreement dated October 12, 1934, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Metallized board);

Agreement dated November 2, 1934, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Metallized board);

Agreement dated December 4, 1934, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee (Metallized board);

Agreement dated August 14, 1935, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Metallized board);

Agreement dated June 8, 1936, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Certain-teed

Products Corporation, as licensee (Perforated lath);
 Agreement dated February 2, 1937, between United
 States Gypsum Company, as licensor, and Ebsary
 Gypsum Company, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United
 States Gypsum Company, as licensor, and Ebsary
 Gypsum Company, as licensee (Perforated lath);

Agreement dated June 23, 1937, between United States
 Gypsum Company, as licensor, and Kelley Plaster
 12703 board Company (Newark Plaster Company, as As-
 signee), as licensee (Perforated lath);

Agreement dated January 3, 1939, between United
 States Gypsum Company, as licensor, and Newark
 Plaster Company, as licensee (Perforated lath).

Article III

The defendant companies, by adhering to the minimum price provisions of the Patent Licenses, in an entire industry, with knowledge of the adherence thereto of the others, have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board, in violation of Section 1 of the Sherman Antitrust Act.

Article IV

1. The minimum price provisions of the Patent Licenses are hereby declared to be illegal.
2. Each of the Patent Licenses is hereby cancelled and terminated.

Article V

Each of the defendant companies and each of their respective officers, directors, agents, employees, representatives, subsidiaries, and any person acting or claiming to act under, through or for them or any of them are hereby enjoined and restrained from:

(1) the further performance or enforcement of any of the minimum price provisions of the Patent Licenses, including any price bulletin issued thereunder;

(2) entering into or performing any agreement or understanding among the defendants or any of them for the purpose or with the effect of continuing, reviving or reinstating any of the minimum price provisions of the Patent Licenses; and

(3) entering into or performing any agreement or understanding among the defendants or any of them in

restraint of trade and commerce in gypsum board among the several states in the eastern territory of the United States by license agreements with minimum price provisions to fix, maintain or stabilize prices of gypsum board, or the terms and conditions of sale thereof.

Article VI

In recognition of the fact that the defendant companies other than defendant United States Gypsum Company, in their manufacture and sale of gypsum board, have relied upon their respective Patent Licenses to use the 12704 patents therein described, said defendant United States Gypsum Company shall grant to each of the other defendant companies which shall apply therefor within sixty (60) days from the date of this decree, in lieu of any such Patent License held by it, an indivisible and non-exclusive license, retroactive to the date of this decree, to make, use and vend gypsum board under any of the unexpired patents described in such Patent License, upon royalties and other terms and conditions not less favorable to such other defendant company than those contained in such Patent License, but without minimum price provisions. The forms of license agreement which the Court has this day ordered filed herein are hereby approved; and the tender by defendant United States Gypsum Company to any such other defendant company of a license agreement containing the terms and conditions set forth in the applicable filed form or forms shall constitute compliance by defendant United States Gypsum Company with the provisions of this Article VI.

Article VII

This decree shall have no effect with respect to defendants' acts and operations without the United States, or to their acts and operations within the United States relating exclusively to acts without the United States; nor shall it have any effect with respect to operations or activities, wherever performed, which are authorized or permitted by the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or by the Act of Congress of August 17, 1937, commonly called the Miller-Tydings Act, or by any present or future act of Congress or amendment thereto.

Article VIII

Jurisdiction of this cause is retained by the Court for the purpose of enabling any of the parties to this decree, or any

other person, firm or corporation bound by any of the provisions hereof, to apply to the Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this decree, for the modification or termination of any of the provisions thereof and for the enforcement of compliance therewith.

Article IX

Judgment is entered against the defendants for %
of the costs to be taxed in this proceeding.

March , 1949

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Exhibit "B" to Memorandum

In the United States District Court
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY, *et al.*, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This suit having been instituted by the United States on August 15, 1940, in the District Court of the United States for the District of Columbia; the Attorney General having filed an expediting certificate on December 16, 1941, resulting in the appointment of a three-judge court on September 17, 1942, to hear the case; this Court having granted on November 15, 1943, the defendants' motion for partial judgment filed with respect to an amendment to the complaint charging that the article claims of five patents owned by United States Gypsum Company were invalid and void; the case having thereupon gone to trial and upon conclusion of the Government's case on April 20, 1944, the appellees having moved to dismiss the complaint under Rule 41(b) of the Federal Rules of Civil Procedure upon the ground that on the facts and the law the Government had shown no right to relief; this Court on June 15, 1946, having filed its opinion holding that the defendants' motion should be granted, and on August 5, 1946, having filed findings of fact and conclusions of law and entered judgment dismissing the complaint, from which judgment the Government appealed directly to the Supreme Court of the United

States; and the Supreme Court having reversed the judgment of this court dismissing the complaint and remanded the case for further proceedings in conformity with its opinion of March 8, 1948;

And this cause having now come on for hearing upon the motion of the plaintiff for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, or, in the alternative, for such further proceedings as the court should order; and after considering the existing state of the record, the pleadings of the action and all proceedings heretofore had herein, including all exhibits and testimony of witnesses, the admissions by counsel for defendants, the offer of proof submitted by certain defendants on June 8, 1948, the briefs submitted on behalf of the parties hereunder, and the oral argument thereon, the majority of this

Court having concluded that the Supreme Court 12706 opinion held that the industry-wide license agreements entered into by defendants, respectively, with knowledge of the adherence of the others, with control over prices and methods of distribution through the agreements and the bulletins hereinafter mentioned, were sufficient to establish a *prima facie* case of conspiracy and constituted a violation *per se* of the Sherman Act notwithstanding the assumed legality of each separate patent license and the *bona fides* of the parties in entering into the license agreements, the *General Electric* case (276 U. S. 476) having no application and affording the defendants no protection under the patent laws, and the majority of this Court having found with respect to the main issue in the case that the defendants, by entering into and continuing throughout the industry a plurality of patent license contracts with price limitation adhered to by the defendants, respectively, with knowledge of the adherence of the others, acted in concert to restrain trade and commerce in the eastern territory of the United States within the meaning of the opinion of the Supreme Court as construed by this Court, and that on that issue plaintiff is entitled to summary judgment in its favor;

This Court, in so far as it deems it necessary in support of its judgment on plaintiff's motion for summary judgment, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This is an action in equity instituted by the United States, hereinafter referred to as the Government, to restrain the defendants from alleged violations of Sections 1, 2 and 3 of the Sherman Act. Injunctive relief is sought under Section 4.

2. The corporate defendants are: United States Gypsum Company (hereinafter referred to as USG), National Gypsum Company (National), Certain-teed Products Corporation (Certain-teed), The Celotex Corporation (Celotex), Ebsary Gypsum Company, Inc. (Ebsary), and Newark Plaster Company (Newark). The individual defendants are Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company (Texas), Sewell L. Avery, Oliver M. Knode, Melvin H. Baker, Henry J. Hartley, Frederick G. Ebsary, and Frederick Tomkins. Avery was president of USG from 1905 to 1936, and since then has been chairman of the Board of Directors. Knode is president* of USG. Baker is president of National. Hartley is president of Certain-teed. Ebsary is president of Ebsary. Tomkins is president of Newark.

3. The defendants are engaged in the mining of gypsum rock and in the manufacture and in the sale in interstate commerce, in the "Eastern area" of the United States, of gypsum board, gypsum plaster, and miscellaneous gypsum products defined in a bill of particulars as gypsum block, gypsum tile, and Keefe's cement. The "Eastern area" includes all of the states of the United States from the East Coast westward to and including New Mexico, Colorado, Wyoming, and the eastern half of Montana. The defendants or their predecessors in interest were, at the time the license agreements were entered into, competitors in the manufacture and sale of substantially all of the gypsum board and a substantial part of the gypsum plaster made and sold in the "Eastern area", and the defendants now make and sell substantially all of the gypsum board and a substantial portion of the plaster in the "Eastern area." Sales of gypsum products are largely to retail dealers in building materials and mason supplies, rather than to building contractors and ultimate consumers.

4. Gypsum board consists of two outer sheets of heavy tough paper, front and back, called "liners," between which there is a lightened gypsum core which is firmly bonded to the paper. Gypsum wallboard is a product used as a

* As of the time when the suit was filed.

finished interior wall. Gypsum lath or plasterboard is a product used as a base, to which a coat of plaster may be applied. The term board, as hereinafter used, includes wall-board and lath or plasterboard. In the manufacture of gypsum products the raw gypsum rock is first subjected to calcination—the process of driving off the water of crystallization by heating. Calcined gypsum, or stucco, when mixed with water, resumes the original content thereof so that the manufactured product is chemically substantially the same as the raw rock and has the same properties. In the reforming process the manufacture of the products above described is made possible. The products are extensively used in the building industry.

5. In the early periods of its manufacture gypsum board was crudely made by pouring buckets of calcined gypsum mixed with water in thin layers between multiple pieces of rough felt paper, smoothing the products with rollers, hardening it on racks and trimming the pieces to size. This was a hand operation. In 1912 the defendant USG commenced the development of more efficient methods of manufacture of gypsum products. An important advance was in the making, by virtue of patent No. 1,034,746, issued in 1912 to ~~ence~~ W. Utzman, of "closed-edge board". Prior to 1912 ~~ence~~ W. Utzman, of "closed-edge board." Prior to 1912 gypsum board had been made with exposed edges. This required trimming, and there was also breakage in shipping and use, with consequent wastage. The making of closed-edge board solved this problem. Various other improvements were developed, including a board making machine,

the use of foam as a substitute for sawdust as an ~~12708~~ "aggregate" in the gypsum core to lighten the board, and the use of starch to improve the bond between paper and core. Metallized board, gypsum board covered with metallic foil, was devised for purposes of insulation; and a gypsum lath perforated in such manner as to increase the fire resisting qualities of wall structure was devised. These improvements were covered by patents—product, process, and machine—many of which were issued to USG; others were acquired by that company. A demand arose in the trade for these improved products, and companies other than USG commenced to copy them. There ensued many years of litigation in which USG strove to enforce, and eventually succeeded in enforcing, its patent rights.

6. Prior to 1917 the Bestwall Manufacturing Company (Bestwall) commenced the manufacture of closed-edge

board. USG sued for infringement and won. *Bestwall Mfg. Co. v. United States Gypsum Co.*, 270 Fed. 542 (C. C. A. 7th, 1921), cert. denied, 263 U. S. 713 (1923). Bestwall had, however, in the course of the litigation, been acquired by The Beaver Products Company, Inc. (Beaver), and USG by a supplemental bill sued both of these companies for infringement and again prevailed. *United States Gypsum Co. v. Bestwall Mfg. Co.*, 15 F. (2d) 704 (N. D. Ill. 1925). These decisions made the manufacture of closed-edge board by a competitor of USG impossible without infringement of USG's patent rights. Prior to the last mentioned decision, Augustus S. Blagden, president of Beaver, made overtures of settlement to Sewell L. Avery, president of USG; he continued these efforts after the decree under the supplemental bill. Avery, at a meeting with Blagden in December, 1925, specified as terms of settlement the payment of damages by Beaver for infringement of USG's patents, acknowledgement by Beaver of the validity of USG's patents, payment of royalties, and the right in USG to fix prices of gypsum board made and sold by Beaver under the Utzman closed-edge patent. A settlement agreement was executed on July 29, 1926, Beaver paying \$250,000 cash damages and USG granting Beaver a license to make, use and sell the patented products, to use the patented processes and to make and use the patented machines.

7. In September, 1925, after the decisions against Beaver, USG sued The American Gypsum Company (American) and the Universal Gypsum and Lime Company (Universal) for infringement, and served a notice of infringement upon the Niagara Gypsum Company (Niagara). On September 17, 1926, a settlement and license agreement was entered into with Universal similar to that with Beaver, except that the lump sum payment was approximately \$35,000. A license agreement was entered into between USG and the Atlantic Gypsum Products Company (Atlantic) on March 5, 1927. In this instance no damages were paid, Atlantic not having previously made gypsum board. Texas signed a license agreement on April 11, 1927. This contract was not by way of settlement of an existing claim of infringement, although it stated that Texas had equipped its plant to make closed-edge board and that USG was threatening to sue if such board were produced.

8. These four license contracts are for convenience referred to in the record as the "1926-1927 contracts." The

licenses granted were under two Utzman patents No. 1,034,746 (the product patent) and No. 1,029,328 (a process patent), and under a third Utzman patent No. 1,330,413 (a machine patent) expiring February 10, 1937, under a Birdsey patent No. 1,358,508 (a product patent for partially closed-edge board), and under some sixty or more other patents and applications for patents. The material provisions of the contracts were these: USG granted an indivisible and non-exclusive license until the expiration of the Utzman machine patent on February 10, 1937. It reserved the right to fix during the life of the Utzman product patent, expiring August 6, 1929, the minimum prices at which the licensees might sell board embodying the disclosure of that patent, but at not more than the prevailing market price. For the privilege of manufacturing, using and selling gypsum board under the patents, the licensees agreed to pay an amount equivalent to a designated percentage of the selling price of the licensees on all gypsum board manufactured by them, whether patented or not, until February 10, 1937, the date of the expiration of the machine patent; they acknowledged and agreed not to contest the validity of the patents under which the licenses were granted; they agreed that all of the patented products sold by them and known in the trade as "seconds" should be invoiced and marked as "seconds." USG agreed that the licensees might sell patented gypsum board to manufacturers of plaster and gypsum products who did not themselves make board (referred to in the record as "manufacturing distributors"), the royalties payable to remain based upon the regular selling price of the licensees to the regular dealer trade. The licensees agreed to keep separate records showing the quantity of all board sold by them, and periodically to render reports to USG showing the quantities and prices of their sales. USG reserved the right to inspect and to make copies of the licensees' memoranda from such records.

9. The gypsum industry in the "Eastern area" was in a demoralized condition in the years 1927-1929. There was litigation, bad feeling, price cutting. The prices of board had fallen so low that for some manufacturers business was no longer profitable. Prices could not go down and business continue; any change would, as a matter of economic necessity, be upward.

10. In May, 1929, following further litigation, four more licence contracts were entered into between USG on the one part and Certain-teed, National, Ebsary, and Niag-

12710 ara, on the other part, in 1923 Certain-teed, originally a manufacturer of roofing products, entered the gypsum industry with the acquisition of the Acme Cement Plaster Company (Acme). In 1926 it commenced the manufacture of open-edge gypsum board at the former Acme plant in Texas. On January 20, 1928, it purchased the assets of Beaver. Beaver was then making a closed-edge board. Certain-teed refused to assume the Beaver-USG settlement agreement and license. USG thereupon, on or about February 21, 1928, instituted suit in the District Court of the United States in Illinois against Certain-teed and Beaver, seeking an injunction against the distribution of the proceeds of sale to the Beaver stockholders and asserting that Certain-teed should be required to assume all liabilities of Beaver under its settlement agreement and license. Certain-teed was required to put up a million dollar bond, or otherwise to suffer a temporary injunction, as security for damages which might be found due USG. On May 22, 1929, Certain-teed settled this suit with USG, agreeing to pay damages of approximately \$64,000 and to fulfill the obligations of Beaver under its original settlement agreement and license; USG executed in Certain-teed's favor a patent license agreement and the suit was dismissed and the bond released. A supplemental license agreement between USG and Certain-teed covering a bundling process patent was executed on July 3, 1929. On May 16, 1929, National settled two patent infringement suits which USG had brought against it, one on November 5, 1926, the other on May 7, 1928, paying on account of damages approximately \$178,000 and entering into a patent license agreement with USG. National had commenced the manufacture of a modified closed-edge gypsum board in 1926. Ebsary, which had commenced making open-edge gypsum board in 1928, was granted a patent license by USG on May 22, 1929. This license was not a part of settlement of an infringement claim, since Ebsary had not manufactured closed-edge board and there was no infringement suit or basis therefor against it. Niagara commenced making an open-edge gypsum board, but later made board with a semi-protected edge covered by a Clark application for a patent owned by American. This board had been developed by American in an attempt to compete with USG's closed-edge board. USG claimed that this board infringed its Birdsey patent No. 1,358,508 covering the manufacture of board with a partially closed edge. Priority over the Clark application had been awarded Birdsey by the Commis-

sioner of Patents; this was affirmed by the Court of Appeals of the District of Columbia in 1926. *Clark v. Birdsey*, 56 App. D. C. 136, 10 F. (2d) 1004. A contract of settlement was entered into between Niagara and USG in May, 1929. This contract is not in evidence but is referred to in a later license agreement between Niagara and USG dated October 8, 1929, in which it appears that the earlier contract provided for money damages to USG in the sum of approximately \$28,000 and a patent license to Niagara.

12711 11. The four license contracts between USG on the one part and Certain-teed, National, Ebsary and Niagara on the other part, are called the "May 1929 contracts" in the record. The provisions of these four contracts were in substance the same as those of the 1926-1927 license agreements except that in the May 1929 contracts the only restriction on USG's right to fix minimum prices for patented board was that the right expired on August 6, 1929, the date of expiration of the Utzman product patent, and sales of the patented product to manufacturing distributors and jobbers were permitted only on USG's written consent. These contracts involved the same patents as the 1926-1927 agreements, with a Birdsey "bundle" patent No. 1,696,877 added covering a method of bundling gypsum board for shipment by binding several boards together into a stack through the application of a gummed tape lengthwise along the edges of the boards. Use of this bundling method was required by the contracts.

12. In 1929 USG owned three applications for patents of Carlisle K. Roos covering cellular core gypsum board produced by the employment of foam or a foaming agent in the core of the board to produce a multitude of cells or voids thereby lightening the board, eliminating the use of sawdust, which had been an unsatisfactory material, as an "aggregate," and resulting in quicker drying. These applications were in interference with an application for a patent by Erick Christian Bayer, a foreign patentee, the the American rights to whose patent had been acquired by USG. The Roos applications prevailed in the interference proceeding and Roos patents Nos. 2,017,022, 2,079,338 and 2,080,009 were ultimately issued to USG (October 8, 1935, May 4, 1937, and May 11, 1937, respectively). On May 23, 1929, after the last of the May 1929 license agreements had been executed, Avery of USG described the scope and nature of the Roos bubble board invention and outlined its advantage, including weight reduction, lower freight cost, elimination of the saw-dust problem, easier handling and

quicker drying, and offered the various licensees above referred to a license on this invention.

13. Shortly after this, Universal, through its president and co-receiver, Eugene Holland, claimed that USG, by using starch in its board to obtain adhesion between the core and paper liners, was infringing two patents owned by Universal known as the Hite and Haggerty patents Nos. 1,230,927 and 1,500,452, respectively. The Hite patent covered a heat insulating material and method of making the same. The Haggerty patent covered a gypsum plaster wallboard employing starch or a cooked carbohydrate in the core of the board to insure a good bond between the core and the paper covering sheets. This had solved the "peeler" trouble in the gypsum board industry and made possible modern high speed production of gypsum board.

Without it, high temperatures used to expedite drying of the board would result in defective board in the form of "peelers," i. e., board having insufficient bond between the liners and the core. In 1927 Universal had brought suit in the United States District Court in Buffalo, New York, against National for infringing of the Haggerty patent, demanding an injunction and an accounting and the court had ruled that the Haggerty patent was valid and infringed (*Universal Gypsum & Lime Co. v. Haggerty*, 21 F. (2d) 544 (W. D. N. Y. 1927)), and National had posted a substantial bond rather than suffer enforcement of a temporary injunction. Avery told Holland that it was not USG's policy to infringe patent rights and that he would investigate the claim. In June and July of 1929 negotiations were going on between USG and its various licensees in respect of a possible license covering the bubble board invention, and the various companies were investigating to ascertain whether the invention had merit. During this same period Holland continued to discuss with Avery separately the matter of the alleged infringement of the Haggerty and Hite starch patents. As a result of these discussions USG agreed to purchase and did purchase these patents. Universal was in receivership and the sale was a favorable one from its standpoint because it provided Universal with substantial funds permitting it to reorganize and emerge from receivership with its accounts paid. The original and ancillary receivership proceedings were in seven different Federal district courts and the sale was approved by all of these courts on or about November 5, 1929. The sale was consummated in a license contract of November 5, 1929, which settled a claim of USG against

Universal for infringement of USG's partially closed-edge patent and the claim of Universal against USG for infringement of the Hite and Haggerty patents. The Hite and Haggerty patents were assigned to USG with reservation of royalty to Universal. Universal was itself granted a license under these patents and under the Birdsey patent No. 1,358,508 and under patents which might be issued under the Roos and Bayer applications and under numerous other patents. This license contract superseded the 1926 license agreement between USG and Universal. In August, 1929 USG had announced its arrangement to purchase the Haggerty and Hite patents and offered its licensees new licenses which would replace the prior license contracts and include in one document the outstanding patents of the earlier licenses, the Haggerty and Hite patents, and the applications for patents on the Roos bubble board invention. This offer was made subject to the approval of the district courts above referred to.

14. Niagara on October 8, 1929, Certain-teed on the 15th, National on the 17th, Ebsary on the 18th, and Atlantic on the 21st, entered into new patent license contracts with USG which superseded the previous agreements between these companies and USG, and these new contracts covered the Hite and Haggerty patents and also the anticipated 12713 patents under the Roos and Bayer applications as well as the unexpired patents of the earlier contracts.

15. As found above, USG had in September, 1925, instituted a suit against American for infringement of USG's closed-edge patent. It had also in the same month commenced a suit against American for infringement of the Birdsey patent on partially closed-edge board. American attempted to obtain a more favorable settlement than had been granted to other infringers. USG's infringement suit with respect to the Birdsey patent had been postponed pending settlement negotiations, reinstated, and ultimately tried and decided in favor of USG. Settlement discussions by American were resumed, with renewed efforts to obtain concessions from USG. On November 25, 1929, American finally settled its outstanding litigation with USG on the terms originally offered, i.e., on terms similar to those of the earlier settlements with other companies, and accepted a license from USG similar to the license contracts of the other licensees. American paid in settlement of past infringement approximately \$152,000. On April 23, 1930, Kelley Plasterboard Company, Inc. (Kelley) took a similar

license. On January 3, 1939, USG consented to the assignment of this license to Newark. Texas did not enter into a license contract in 1929, but continued as a licensee under its license of April 11, 1927, although it was not subject to price control after August 6, 1929, the date of the expiration of the Utzman closed-edge patent and no effort was made by any defendant or any agent of any defendant to establish or control the price at which Texas sold gypsum board during the period from August 6, 1929, until February 10, 1937, at which time its license of April 11, 1927, expired and Texas accepted a further license contract similar in form to the November 1929 contract with the other licensees. This completed the execution of the nine contracts generally referred to in the record as the "November 1929 contracts" (although the Texas contract was not executed until 1937 and the Kelley contract not only until April 23, 1930) with Niagara, Certain-teed, National, Ebsary, Atlantic, Universal, American, Kelley, and Texas. Each of these contracts extended licenses under the Haggerty and Hite patents, under patents which might be issued under the Roos and Bayer applications, and under a large number of patents still vital which had been the subject of the previous contracts including the Utzman machine patent No. 1,330,413 Birdsey patent No. 1,358,508 on the partially closed-edge board, the bundle patent No. 1,696,877, and under patents which might be issued under several additional applications for patents. These November 1929 contracts were in general in the same terms as the earlier contracts. Each contained a "most favored nation" clause providing that if subsequent to the effective date of a particular agreement USG should grant to any other person, except to Universal, a license more favorable in terms, then USG would grant to the particular licensee a license on the same terms. The Texas contract alone in its "most favored nation" clause did not contain the exception to Universal. The price fixing clause contained a provision that the minimum prices fixed by USG should not be more than those at which USG determined to sell gypsum board or other products embodying the inventions claimed in the patents to its own like trade in the same market. Use of the Birdsey bundling process by the licensees was made optional.

16. Niagara was acquired by USG in 1929. National acquired Universal in 1935 and Atlantic in 1936. Newark acquired the stock of Kelley in 1937 and merged with Kelley in 1939. Celotex entered the gypsum industry for the first

time when it acquired the assets of American in 1939. Upon acquiring these companies respectively National Newark and Celotex took over the above-mentioned licenses which had been entered into by Universal, Atlantic, Kelley and American with USG.

17. In addition to the 1926-1927, May 1929, and November 1929, contracts which related to gypsum board as such (sometimes hereinafter referred to as the main board license agreements), certain additional contracts, sometimes referred to in the record as "subordinate contracts," relating to metallized board and perforated lath, were executed as follows: At various times in 1934-1935 USG, as owner of Roos patent No. 1,914,345 covering the use of metallic foil as a thermal insulating element in board, granted licenses to various other companies. The license contracts in evidence are those of National of October 5, 1934, Kelley of October 12, 1934 (USG on January 3, 1939, consented to the assignment of this contract to Newark), Certain-teed of November 2, 1934, Atlantic of November 30, 1934, American of December 4, 1934 (assigned to Celotex on April 12, 1939), Universal of April 4, 1935, and Ebsary of August 14, 1935. In these contracts USG granted licenses to make, use and sell board having a metallized surface embodying the inventions disclosed and claimed in the patents or patent applications covered by the contracts, and reserved the right to fix the minimum prices on board embodying the inventions in question, but at not more than USG's own price in the same market. The licensees agreed to pay a royalty for all board having a metallized surface manufactured and sold by the licensees and covered by the claims of the patents issued or to be issued under applications for patents. The licensees agreed not to sell metallized board to other board manufacturers except upon USG's written consent, and not to sell to anyone on consignment. They agreed to acknowledge and not to contest the validity of the patents issued or to be issued and to record the quantities of metallized board manufactured "and/or sold," USG reserving the right to inspect and copy such records. Each licensee was accorded the position of a "most favored nation" with respect to licenses under these patents.

12715 18. Similarly USG was the owner of Roos patent

No. 1,938,354 covering a fire resistant plasterboard. This board had holes of given size punched through it at designated intervals. Upon application of a coat of plaster the same pushed its way through the holes and hardened into a mechanical key with consequent improvement of the

fire resistant qualities of the wall in which such plaster-board was used. USG granted patent licenses to Certain-
 teed on June 8, 1936, American on July 10, 1936, Ebsary
 on February 2, 1937, and Kelley on June 23, 1937, for the
 manufacture, use and sale of this board. In substance the
 terms of these licenses were the same as those of the metal-
 lized board license contracts. Later USG offered a re-
 vised perforated lath license to its licensees royalty-free,
i.e., extended an offer to include the perforated board patent
 in the main board license agreement at no additional royal-
 ty. Such revised licenses were accepted by Certain-teed,
 Ebsary and Kelley. On January 3, 1939, USG granted
 Newark, which had merged with Kelley, a royalty-free per-
 forated lath license, at the same time cancelling the Kelley
 revised license.

19. Minimum price bulletins were sent out by USG to
 its licensees under the various license contracts, except dur-
 ing the period from August 6, 1929 (the date of expiration
 of the Utzmair product patent No. 1,034,746), until the date
 of the execution of the November 1929 contracts. The price
 bulletins are limited in their application to patented board
 manufactured and sold by each licensee under its license.
 The price on board was calculated on the basis of a mill
 price plus freight from nearest mill (freightwise) to point
 of destination. The bulletins provided for prices on various
 quantities of board, such as carloads, less-than-carloads, and
 truckloads. In particular markets, such as metropolitan
 areas, where it was economic to deliver gypsum board in
 truckload quantities, prices were established for such quan-
 tities and the areas in which such prices were to apply were
 defined. Outside of such areas a higher price was fixed. Pro-
 vision was made in various instances for a variation in
 price to cover pool car shipments, railroad switching
 charges, and "pick-ups" at a mill. The bulletins contained
 provisions purposed to prevent the violation of the mini-
 mum price requirements through such devices, in connection
 with a sale of board, as the giving away of board as "dun-
 nage," making advertising allowances to the customer,
 granting of fictitious damage claims, splitting of commis-
 sions with the customer by commission salesmen, paying
 of unearned warehousing charges, fictitious hiring of cus-
 tomers' trucks, giving away of plaster or other products, or
 the sale of such products at a price unusually below the
 licensee's prevailing market price.

20. During the periods when price bulletins were sent
 out by USG to its licensees, each licensee, in the main, sold

gypsum board manufactured by it at the prices and upon the terms and conditions stipulated in the bulletins. No bulletins have been sent out since July 8, 1941.

12716 21. In 1932 USG set up as a department a wholly owned corporation called the Board Survey Company. Its function was to receive complaints of license violations, to investigate the facts, call them to the attention of the licensee involved, and upon occasion to the attention of the licensor USG. Board Survey Company was organized by USG for the purpose of bringing about compliance with the licenses. The licensees had no part in its formation, management or operation. From time to time a representative of USG, as licensor, met with representatives of the licensee companies for the purpose of explaining to them the provisions of the minimum price bulletins and for the purpose of securing adherence to such minimum prices by the licensees.

22. All of the license agreements except that of July 29, 1926, between USG and Beaver and that of September 17, 1926, between USG and Universal were executed after the decision in the *General Electric* case on November 23, 1926; and *Bement v. National Harrow Company* had long been decided (May 19, 1902) before the Beaver and Universal agreements were signed. The license agreements were executed upon the faith of these decisions. Prior to the making of the licenses in the instant case, the parties thereto had been advised that such licenses giving price control to the licensor were proper and that they had a right to enter into them under the patent laws.

23. Plaintiff rested its motion for summary judgment upon the single ground that the defendants, constituting all of the competitors in the gypsum industry in the territory of the United States east of the Rocky Mountains as defined in the complaint, combined under patent licenses to fix the prices of patented gypsum board manufactured and sold under said licenses. The defendants are competitors and all of the manufacturers of gypsum board in the United States in said area east of the Rocky Mountains. Since May 23, 1929, up to the time the complaint was filed herein, and subsequently until July 8, 1941, except for a short period between August 9, 1929 and the effective date of the November 1929 licenses, the minimum prices of gypsum board embodying the claims of the patents under which the licenses were issued were fixed by USG as licensor, pursuant to the price limitation provision contained in the patent licenses. The defendants' licenses were substantially identical, all provided for price control, and USG, during

the whole of the period, admittedly issued price bulletins to its licensees fixing the minimum prices of patented gypsum board. USG organized and used an agency known as Board Survey Company, to investigate the prices at which patented board was sold by its licensees, to insure adherence by them to the price provisions of its parent licenses, which agency was dissolved and discontinued prior to the filing of the complaint. At and prior to the filing of the complaint herein the several licenses in the case of said gypsum board in said territory, adhered to the minimum prices so fixed by USG, with knowledge of the existence of the license agreements of the other licensees and that USG exercised the right reserved to it thereunder to fix the minimum price of patented board manufactured and sold by them.

24. There is no genuine issue as to the facts hereinbefore found.

25. Under the opinion of the Supreme Court, as construed by us, we find that the defendants, by entering into and complying with patent license contracts, industry-wide in the eastern territory of the United States, with price limitation therein adhered to by them with knowledge of the adherence of others, thereby acted in concert to restrain trade and commerce in patented gypsum board among the several states in the eastern territory of the United States.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this cause.

2. The defendants herein, respectively, by entering into and complying with patent license contracts, industry-wide, in the eastern territory of the United States, with price limitation therein adhered to by them with knowledge of the adherence of others, acted in concert to restrain trade and commerce in the eastern territory of the United States and have thereby contracted, combined and conspired to restrain trade and commerce in patented gypsum board among the several states in the eastern territory of the United States in violation of Section 1 of the Sherman Antitrust Act.

3. The plaintiff is entitled, on its motion for summary judgment filed herein pursuant to Rule 56 of the Federal Rules of Civil Procedure, to judgment on the issue referred to in Conclusion Number 2.

March , 1949

12718 (File Endorsement Omitted)

12719 In the Supreme Court of the United States

Statement of Appellant in Support of its Motion to Supplement the Record—Filed April 26, 1950

Appellees United States Gypsum Company, Sewell L. Avery, and Oliver M. Knode have filed a statement making certain objections to adding to the record on appeal appellant's proposed findings and conclusions. The first objection is that such proposed findings and conclusions should not be included in the record because they are "argumentative and brief-like in character". We submit that this characterization may be applied with equal force to the appellees' proposed findings and conclusions, which have been included in the record on appeal. Each set of findings and conclusions is, whether argumentative or not, a proper part of the record on appeal.

Appellees' second objection is that appellant did not assign error with respect to its proposed findings and conclusions. But the reasons for including such findings and conclusions in the record are (1) that they serve to define the position taken by the Government in the district court, which may be material to the issues raised by the appeal, and (2) that they serve to show the basis for provisions of the Government's proposed decree not included in the district court's judgment, which omission has been assigned as error.

PHILIP B. PERLMAN
Solicitor General.

April 26, 1950

12721 (File Endorsement Omitted)

12722 In the Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of Parts of the Record Necessary for Consideration Thereof—Filed March 16, 1950

12723 1. Now comes the appellant in the above-entitled cause and for its statement of points upon which it intends to rely in its appeal to this Court adopts the points contained in its assignment of errors heretofore filed herein.

2. Omit printing all of the items listed under Parts I and II of appellant's praecipe to the Clerk of the United States District Court for the District of Columbia. All of the items listed under Part III of said praecipe are necessary for the consideration of the foregoing points, and said appellant designates all of Part III of said praecipe for printing by the Clerk of this Court, except the following pages of the Transcript of Proceedings (Part III, Item 9):

1. Pages 7802, line 2, to 7805, line 21, both inclusive.
2. Pages 7943 to 8300, both inclusive.

PHILIP B. PERLMAN
Solicitor General

This 9th day of March, 1950.

12727 (File Endorsement Omitted)

12728 In the Supreme Court of the United States

*Designation of Additional Parts of the Record to be
Printed—Filed March 27, 1950*

Now come United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, appellees in the above-entitled cause, by their attorneys, and, in accordance with the requirements of Rule 13(9) of this Court, hereby designate the following parts of the record for printing by the Clerk of this Court, in addition to those parts designated for printing by appellant:

1. Those parts of the record set forth in Items 3 through 5 of the counter-praecipe of said appellees filed herein on February 3, 1950.

2. The following pages of the Transcript of Proceedings before the District Court (appellant's praecipe, 12729 dated January 25, 1950, Part III, Item 9):

(a) Page 7966, Line 1 through Line 24;

(b) Page 7968, Line 1 through Line 6;

(c) Page 7977, Line 7, through Page 7979, Line 16;

(d) Page 7988, Line 22, through Page 8018, Line 24;

(e) Page 8129, Line 1 through Line 24.

(f) Page 8150, Line 3, through Page 8151, Line 25;

(g) Page 8265, Line 1, through Page 8272, Line 17;

(h) Page 8275; Line 9, through Page 8280, Line 2;
and

(i) Page 8288, Line 23, through Page 8297, Line 17.

Said appellees further states that it may possibly be necessary, in connection with a consideration of the points raised by the appellant on this appeal, to refer to those parts of the record set forth in Parts I and II of the praecipe of appellant dated January 25, 1950. Said appellees concur, however, with the suggestion of the appellant which is contained in its "Statement of Points, etc.", dated March 9, 1950, that said parts of record not be printed for the reason that said parts of the record were included in the printed record on the prior appeal to this Court in this case.

March 25, 1950

Respectfully submitted,

BRUCE BROMLEY
ALBERT R. CONNELLY

HUGH LYNCH, JR.

Attorneys for appellees

*United States Gypsum Company,
Sewell L. Avery and Oliver M. Knode*

Service of the foregoing Designation of Additional Parts of the Record to be Printed is hereby acknowledged this 27th day of March, 1950.

PHILIP B. PERLMAN
Attorney for Appellant
MK.

12731 (File Endorsement Omitted)

12732 Supreme Court of the United States
No. 30,, October Term, 1950

*Order Noting Probable Jurisdiction and Granting Motions
to Supplement the Record—May 29, 1950*

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

On consideration of the motions of appellant and appellees to supplement the record in this case, it is ordered that the said motions be, and they are hereby, granted.

Mr. Justice Jackson and Mr. Justice Clark took no part in the consideration or decision of the jurisdictional question or motions to supplement the record.

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No. ~~670~~ 30

In the Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950

THE UNITED STATES OF AMERICA, APPELLANT

v.

UNITED STATES GYPSUM COMPANY, SEWELL L.
AVERY, OLIVER M. KNODE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

**UNITED STATES GYPSUM COMPANY, ET AL.,
DEFENDANTS**

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause on November 7, 1949. A petition for appeal is presented to the district court herewith, to wit, on January 6, 1950.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, Pub. Law 773, 80th Cong.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Associated Press, Inc. v. United States, 326 U. S. 1;
United States v. U. S. Gypsum Co., 333 U. S. 364.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1, 2, 4) commonly known as the Sherman Act, are as follows:

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

* * * * *

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

THE ISSUES AND THE RULING BELOW

This is a civil proceeding brought by the United States under Section 4 of the Sherman Act charging six corporations and seven individuals with conspiring to fix prices on patented gypsum board and unpatented gypsum products, and otherwise to restrain and monopolize interstate commerce in such goods, in violation of Sections 1 and 2 of the Sherman Act. An expediting certificate was filed under the Expediting Act of February 11, 1903, as amended, and a three-judge district court was appointed. On April 20, 1944, at the close of the presentation of the Government's evidence, the defendants moved to dismiss the complaint under Rule 41(b) of the Federal Rules of Civil Procedure upon the ground that the Government had shown no right to relief. The district court subsequently held that this motion should be granted, and in August 1946 it filed findings of fact and conclusions of law and entered judgment dismissing the complaint.

On appeal, the judgment of dismissal was reversed and the case was remanded for further proceedings in conformity with the Court's opinion. *United States v. U. S. Gypsum Co.*, 333 U. S. 364. The district court was held to have erred in its interpretation of *United States v. General Electric Co.*, 272 U. S. 476, in concluding that the Government's evidence failed to show violation of the Sherman Act, and in certain of its findings of fact.

Following such remand, the Government requested a pre-trial conference to determine what factual issues remained for trial and what categories of evidence the defendants intended to adduce. At a hearing on this matter the district court requested that the Government file a motion for summary judgment and that the defendants file a

proffer of proof, in order that the court might thereby have a basis for making a ruling on the future course of the proceeding. After such motion and such proffer had been filed and after argument thereon, the district court ruled on June 29, 1948, that the proof which the defendants proffered gave rise to no genuine issue as to any fact material to an adjudication that the defendants had violated the Sherman Act, and that the Government's motion for summary judgment should be granted.¹ Judge Stephens dissented from these rulings. The opinions of Judges Garrett and Jackson as orally delivered on June 29, 1948, and the dissenting opinion of Judge Stephens as revised and filed on November 7, 1949, are annexed to this Statement.

The Government and defendant U. S. Gypsum each submitted proposed findings of fact and conclusions of law and a proposed decree. On November 7, 1949, the court, without making findings of fact or conclusions of law or rendering an opinion, entered a final decree, a copy of which (together with Judge Stephens' dissent therefrom) is attached to this Statement. The material provisions of this decree, which in substance are those which defendant U. S. Gypsum had proposed, may be summarized as follows:

The "defendant companies" are adjudged to have violated Sections 1 and 2 of the Sherman Act (Art.

¹ The Government's motion prayed for summary judgment in its favor, or, if such judgment should not be rendered on the whole case or for all the relief asked and a further trial should be necessary, that the court ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just. See Rule 56(d) of Federal Rules of Civil Procedure.

III).² Each such defendant is enjoined from agreeing with any defendant for the purpose or with the effect of continuing or reviving "any monopolistic practice," and from agreeing with any defendant "in restraint of" interstate commerce in gypsum board in the eastern territory of the United States "by license agreements to fix, maintain or stabilize prices" or terms of sale of gypsum board (Art. V, pars. (2), (3)). Each patent license agreement between defendant U. S. Gypsum and any other defendant in effect at the time the complaint in this case was filed (August 15, 1940) is declared null and void (Art. IV) and further enforcement is enjoined (Art. V, par. (1)). Judgment for 50% of the taxable costs of the proceeding is entered against the "defendant companies" (Art. X).

Defendant U. S. Gypsum is required to grant to "each applicant therefor within 90 days after the effective date hereof" a non-exclusive license under any or all of the gypsum board patents presently owned by U. S. Gypsum, at a royalty not in excess of the royalty on the same article or process fixed in the license agreements which the decree outlaws (Art. VI, par. 1). U. S. Gypsum may satisfy this obligation by tendering a license agreement containing the terms and conditions set forth in the forms of license agreement which the court "hereby approved" and "ordered filed herein" (Art. VIII). Since the approved forms of agreement cover only the patents licensed under the agreements which the decree strikes down, it is clear that U. S. Gyp-

² "Defendant companies" are defined as the six corporate defendants plus Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company (Art. II, par. 1).

sum's obligation to license is confined to these patents.³

THE QUESTIONS ARE SUBSTANTIAL

We submit that the district court's decree patently fails to provide effective safeguards against continuation or renewal of defendants' noncompetitive pricing practices. Under the leadership of a dominant member of the industry, U. S. Gypsum, defendants have engaged in an elaborate, industry-wide program to eliminate price competition in the sale of gypsum board. They have, in carrying out this program, suppressed the production of competitive unpatented products, stabilized prices on such products, and squeezed out a class of distributors. See *United States v. U. S. Gypsum Co.*, *supra*, at p. 400.

For all practical purposes, the decree does no more than terminate the provisions of existing license agreements which authorize U. S. Gypsum to fix its licensees' sales prices. The injunctive provisions of paragraph (2) of Article V are phrased in such general terms that the proof requisite to establish a violation would approximate the proof required to establish a violation of the Act itself. The injunctive provisions of paragraph (3) of Article V are confined to restraints effected by license agreements. They therefore would not apply to price fixing activities carried on through some other medium, such as a trade association, nor would they apply to concerted action to control or stabilize prices of gypsum products.

Where trade has been illegally restrained or monopolized through a misuse of rights claimed under patents, the courts have recognized that, in order to

³ This conclusion is supported by the decree's definition of the words "patents" and "patent licenses" (Art. II, pars. 2, 4).

dissipate the effects of the illegal conduct, the patentee should be required to make his patents available, on reasonable terms, to anyone wishing to use them. *Hartford-Empire Co. v. United States*, 323 U. S. 386, 419; *United States v. National Lead Co.*, 332 U. S. 319, 336-337, 348-349. While the present decree provides for licensing "any applicant," the 90-day time limitation on this requirement makes it a practical nullity as far as any newcomer to the business is concerned. The serious business and patent questions involved in embarking upon manufacture of gypsum board can hardly be determined within 90 days after the decree becomes effective.

* The decree tends to enhance U. S. Gypsum's existing dominant position in the industry. Its licensees have not previously been concerned with the validity or scope of U. S. Gypsum's patents, and are thus at an obvious disadvantage in bargaining with U. S. Gypsum as to the terms of new license agreements. The decree, instead of providing for a third-party determination of disputed provisions of such agreements, permits a royalty rate as high as that under the corresponding outlawed agreement, and permits U. S. Gypsum to adopt the other provisions of the forms of agreement approved by the court. The form applicable to U. S. Gypsum's most important patents requires the licensee to report to U. S. Gypsum monthly the "quantity" of gypsum board manufactured under the licensed patents and the "selling price" thereof, and permits U. S. Gypsum to inspect the licensee's records, either directly or through a certified public accountant. U. S. Gypsum thus has the competitive advantage of exact information as to its competitors' sales and prices. In addition, the furnishing

of such information would strongly militate against competitive pricing or sales expansion by any licensee, because of fear of possible reprisals by U. S. Gypsum.

Since some of the individual defendants, particularly defendant Sewell L. Avery, were the principal architects of the acts and conduct held to be illegal, the Government seems plainly entitled to an adjudication that these defendants violated the statute, and to have the injunctive provisions of the decree run against them. Another question of error which the appeal presents is failure to impose upon the defendants the full taxable costs of the proceeding. See *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F. 2d 1, 11 (C.A. 7).

The district court appears to have been of the opinion that the defendants in good faith believed that their conduct was within rights given by the patent law and to have concluded that in these circumstances the court, insofar as it was free to exercise discretion, should enter a decree as painless to the defendants as possible. The validity of this novel theory is a question of substance which the appeal presents.

Another question of substance which the appeal will present is whether, when summary judgment is entered against the defendants in a proceeding under the Sherman Act, the usual rule prevails that the judgment should be so framed that it will bar further violation of the statute not only by the means found to have been employed but also by "untraveled roads" to the same end, and that it will "effectively pry open to competition a market that has been closed by defendants' illegal restraints." See *International Salt Co. v. United States*, 332 U. S. 392, 400-402.

We submit that the various deficiencies in the decree to which we have referred present questions of undoubted substance. In many civil proceedings under the Sherman Act, the adequacy of the relief granted is of critical and even central importance. In numerous appeals from judgments entered in such cases, the adequacy or appropriateness of the relief granted by the trial court has presented an issue of more general importance, and one which was more sharply disputed, than the question of substantive violation of the statute. *Crescent Amusement Co. v. United States*, 323 U. S. 173; *United States v. National Lead Co.*, 332 U. S. 319; *Paramount Pictures, Inc. v. United States*, 333 U. S. 131. The basic issue which this appeal presents is, in short, whether "the Government has won a lawsuit and lost a cause." See *International Salt* case, *supra*, at p. 401.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

JANUARY 6, 1950.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY, ET AL.,
DEFENDANTS

GARRETT, J.: I have studied the proffers of proof very carefully in the light of the motion for summary judgment and in the light of the argument made in the briefs.

It is my opinion that if everything should be testified to, which is in the proffers of proof, it would not bring any change in the decision of the Supreme Court on the fundamental question involved.

I do not care to go into any detail about the matter. Of course it is very well known my judgment was different originally, but the Supreme Court has spoken, and I am unable to see wherein there is any loophole through which there may be a conclusion different from that reached by the Supreme Court upon the fundamental questions.

Hence, I think the summary judgment should be granted, but I take the precaution to say that the decree following the summary judgment, if it comes or when it does come, must be examined with great care because it should not include matters which were not in issue before the Supreme Court.

That, I think, is all that I have to say.

JACKSON, J.: Judge Garrett's reasoning parallels mine. I, too, feel that if everything were proved by witnesses on the stand that is stated would be attempted to be proved in the offer of proof, that still there would be no genuine issue of a material fact. There is no sense in going to great length to explain my view. I agree with Judge Garrett. I have read very carefully the briefs, listened with

attention and an open mind to the arguments, but I just can't understand how I could come to any other conclusion in view of the decision of the Supreme Court.

STEPHENS, J.: I think that the entry of a summary judgment against the defendants is not warranted. The case was before the Supreme Court for review of the correctness of the trial court's mid-trial dismissal, under Rule 41 (b), Federal Rules of Civil Procedure, of the Government's complaint. The dismissal was after the Government had completed presentation of the evidence which it relied upon to sustain the charges in its complaint, but before any evidence had been presented by the defendants. As I read its opinion the Supreme Court determined that the Government's evidence established *prima facie* the violations of the Sherman Act, or some of them, charged in the Government's complaint. But these charges—outlined in paragraphs 44-46(a) inclusive, and detailed in paragraphs 47-123 inclusive, of the complaint are denied by the defendants' answers.⁴ Hence there

⁴ The charges reduce themselves in essence to the following: (1) That the license contracts entered into between the defendant USG, as licensor, and the other defendants, as licensees, are themselves illegal as in restraint of trade in view of the nature of the patents upon which the contracts are based, in view of the fact that USG and the plurality of defendant licensees manufacture all of the gypsum board in the "Eastern area," and in view of the terms and conditions of the contracts, including those providing for the establishment of minimum prices on patented gypsum board to be made and sold by the defendants. (2) That the license contracts, even if valid on their face, were not entered into as bona fide license agreements, reasonably designed to secure to USG the pecuniary reward for valid patent monopolies, but were executed by the defendants merely to give color of legality to a combination to restrain trade, by control of the prices and terms and conditions of sale of gypsum board, plaster, and miscellaneous gypsum products throughout the gypsum industry. (3) That the defendants' operations were carried beyond the proper limits of a patent monopoly and licensing thereunder by raising and fixing at arbitrary and non-competitive levels the price of gypsum board made and

remain in the case genuine issues of material fact. This forbids the entry of a summary judgment for under Rule 56 (c), Federal Rules of Civil Procedure; such a judgment can be rendered only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ." And I think that in setting aside the trial court's findings of fact and in saying that "By the record *now presented*" violation of the Sherman Act is clear and in saying that, as the order of dismissal came at the end of the Government's presentation on defendants' motion to dismiss under Rule 41 (b), "the order is reversed and the case remanded *for further proceedings in conformity with this opinion*,"⁵ the Supreme Court meant that the defendants' evidence should be heard and the case disposed of by the trial court upon the merits on the issues raised by the complaint and the answers and upon findings of fact and conclusions of law to be made anew after a weighing of all of the evidence, *i.e.*, that to be presented by the defendants as well as that which has been introduced by the Government. It is in my view not to be thought that the Supreme Court contemplated denial to the defendants of their day in court upon the issues raised by the pleadings. But that is the effect of the summary judgment; the defendants have made offers of proof but they are not to be permitted to present evidence. It is

sold by the defendants by improper standardization of gypsum board and its method of production, by raising, maintaining and stabilizing the level of prices of unpatented materials—plaster and miscellaneous gypsum products—by effectuating improper restriction upon distribution of gypsum board, plaster and miscellaneous gypsum products, and by fixing the prices at which manufacturing distributors resold gypsum board. (4) That the patents, or some of them, upon which such license agreements were purportedly based are invalid.

⁵ *United States v. United States Gypsum Co.*, 333 U.S. 364, 401, 402 (1948); italics supplied.

true that it is without dispute in the case that patent licenses with price fixing limitations were executed by the defendants, that these licenses were, in the large, adhered to by each defendant with knowledge of the adherence of others, and that they were industry wide; and these undisputed facts were adverted to by the Supreme Court in the course of its opinion ruling that a *prima facie* case of conspiracy to violate the Sherman Act had been made out by the Government. But I do not read the opinion of the Court as ruling that such a plurality of patent licenses is, without more, conclusive, rather than merely *prima facie*, evidence of a violation of the Sherman Act. Had the Court regarded such a plurality of licenses, without more, as conclusive evidence of a violation of the Act it would I think have overruled *United States v. General Electric Company*, 272 U. S. 476 (1926). This it did not do either in its decision in the instant case or in *United States v. Line Material Co.*, 333 U. S. 287 (1948). In the latter case the Sherman Act violation found by the Supreme Court was laid by it to the cross-licensing of the Lemmon and Schultz patents, not to the admitted plurality of licenses with price fixing provisions entered into, as the Court said, as the result of arm's length bargaining although with knowledge on the part of each licensee of price provisions in the licenses of others.

I think therefore that the defendants should be permitted to present their offered proof on the issues of fact raised by their answers to the Government's complaint and that the court should then hear argument by counsel for the parties and should, after weighing the evidence of both the Government and the defendants, make findings of fact and conclusions of law anew and then render judgment according thereto.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLUM-
BIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; HENRY J. HARTLEY; AND FREDERICK TOMKINS, DEFENDANTS.

PRELIMINARY STATEMENT

This cause came on for trial before this Court on November 15, 1943. At the conclusion of plaintiff's presentation of the case, defendants moved, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, for judgment dismissing the complaint on its merits. The motion of defendants was granted August 6, 1946. The judgment so rendered by this Court was reversed by the Supreme Court of the United States, and the case was remanded to this Court for further proceedings in conformity with the opinion of the Supreme Court (333 U. S. 364).

Following the remand, the plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, moved for summary judgment in its favor upon the pleadings and all of the proceedings which therefore had been had in the case, or, in the alternative, for such further proceedings as this Court might direct, and defendants, by direction of the Court, filed proffers of proof.

Argument by counsel for the respective parties upon the motion of plaintiff was heard by the

Court, and after due consideration of such argument and of defendants' proffers of proof, Garrett, J., and Jackson, J., constituting a majority of the Court, announced a ruling to the effect that plaintiff's motion for summary judgment would be granted, and Stephens, J., who presided during the trial, announced his dissent from such ruling.

Thereafter counsel for plaintiff and counsel for certain of the defendants submitted forms of final decrees for the consideration of the Court and also suggested findings of fact, the latter to be considered in the event the Court should deem it necessary to make any findings of fact additional to those originally found by it and to those stated in the opinion of the Supreme Court.

In due course, the Court heard arguments respecting the proposed decrees and the suggested findings of fact, and full consideration has been given thereto and to all prior proceedings—all being considered in the light of the decision of the Supreme Court which, as understood by the majority of this Court, held that the defendants acted in concert to restrain trade and commerce in the gypsum board industry and monopolized said trade and commerce among the several states in that section hereinafter referred to as the eastern territory of the United States, which section embraces all the states of the United States westward from the eastern coast thereof to the Rocky Mountains and including New Mexico, Colorado, Wyoming, and the eastern half of Montana.

DECREE

The motion of plaintiff for a summary judgment is sustained and in conformity with the decision of the Supreme Court, as understood by the majority of this Court, and in obedience to its mandate, it is ordered, adjudged and decreed:

ARTICLE I

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint

states a cause of action against defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", commonly known as the Sherman Antitrust Act, and acts amendatory thereof and supplemental thereto.

ARTICLE II

As used in this decree:

1. "Defendant companies" shall mean all of the corporate defendants and Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company.

2. The "Patents" shall mean United States Letters Patent and applications for United States Letters Patent owned by defendant United States Gypsum Company which are described in the Patent Licenses, as hereinafter defined, and continuations in whole or in part, renewals, reissues, divisions, and extensions thereof.

3. "Gypsum board" shall mean plaster board or lath (including perforated and metallized lath) and wallboard (including metallized wallboard) made from gypsum and embodying any of the inventions or improvements set forth and claimed in any of the Patents.

4. "Patent Licenses" shall mean the patent license agreements which were in effect between defendant United States Gypsum Company and each of the other defendant companies at the time the complaint herein was filed and described in said complaint as follows:

Agreement dated October 15, 1929, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee;

Agreement dated October 17, 1929, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee;

Agreement dated October 18, 1929, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee;

Agreement dated November 5, 1929, between United States Gypsum Company, as licensor, and Universal Gypsum and Lime Company (National Gypsum Company, as Assignee), as licensee;

Agreement dated November 25, 1929, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee;

Agreement dated April 23, 1930, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Co., as Assignee), licensee;

Agreement dated February 10, 1937, between United States Gypsum Company, as licensor, and Texas Cement Plaster Company, as licensee;

Agreement dated October 5, 1934, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee (Metallized board);

Agreement dated October 12, 1934, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Metallized board);

Agreement dated November 2, 1934, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Metallized board);

Agreement dated December 4, 1934, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee (Metallized board);

Agreement dated August 14, 1935, between United States Gypsum Company, as licensor,

and Ebsary Gypsum Company, as licensee (Metallized board);

Agreement dated June 8, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

Agreement dated February 2, 1937, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated June 23, 1937, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Perforated lath);

Agreement dated January 3, 1939, between United States Gypsum Company, as licensor, and Newark Plaster Company, as licensee (perforated lath), and any supplement or amendment to any of said patent license agreements.

ARTICLE III

The defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of sections 1 and 2 of the Sherman Antitrust Act.

ARTICLE IV

Each of the license agreements listed in Article II hereof is adjudged unlawful under the anti-

trust laws of the United States and illegal, null and void.

ARTICLE V

Each of the defendant companies and each of their respective officers, directors, agents, employees, representatives, subsidiaries, and any person acting or claiming to act under, through or for them or any of them are hereby enjoined and restrained from

(1) the further performance or enforcement of any of the provisions of the Patent Licenses, including any price bulletin issued thereunder;

(2) entering into or performing any agreement or understanding among the defendants or any of them for the purpose or with the effect of continuing, reviving or reinstating any monopolistic practice.

(3) entering into or performing any agreement or understanding among the defendants or any of them in restraint of trade and commerce in gypsum board among the several states in the eastern territory of the United States by license agreements to fix, maintain or stabilize prices of gypsum board or the terms and conditions of sale thereof.

ARTICLE VI

1. Defendant United States Gypsum Company is hereby ordered and directed to grant to each applicant therefor within 90 days after the effective date hereof, but only in so far as it has the right to do so, a non-exclusive license to make, use and vend under any, some, or all patents and patent applications now owned or controlled by it relating to gypsum board, provided that such license agreement fixes a royalty not to exceed the royalty on the same article or process fixed in the license agreements set out in Article II hereof.

2. Defendant United States Gypsum Company is hereby enjoined and restrained from making any sale or other disposition of any of said patents or patent applications which would deprive it of the power or authority to grant such licenses, unless in any sale, transfer or assignment it shall be required that the purchaser, transferee or assignee shall observe the provisions of this section.

ARTICLE VII

Nothing contained in this decree shall be deemed to have any effect upon the operations or activities of said defendants which are authorized or permitted by the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or the Act of Congress of August 17, 1937, commonly called the Miller-Tydings Act, or by any present or future act of Congress or amendment thereto; provided, however, nothing contained in this article shall in any manner affect the provisions of Article VI of this decree.

ARTICLE VIII

The forms of license agreement which the Court has this day ordered filed herein are hereby approved; and the tender by defendant United States Gypsum Company to each applicant for a license agreement containing the terms and conditions set forth in the applicable filed form or forms shall constitute compliance by defendant United States Gypsum Company with the provisions of Article VI.

ARTICLE IX

Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this decree, or any other person, firm or corporation that may hereafter become bound thereby in whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction

or carrying out of this decree, and (2) for the enforcement of compliance therewith.

ARTICLE X

Judgement is entered against the defendant companies for 50% of the costs to be taxed in this proceeding, and the costs so to be taxed are hereby prorated against the several defendant companies as follows:

United States Gypsum Company	55%
National Gypsum Company	23%
Certain-teed Products Corporation	11%
The Celotex Corporation	3%
Ebsary Gypsum Company, Inc.	3%
Newark Plaster Company	4%
Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company	1%

Let the decree be entered.

(S.) FINIS J. GARRETT,
FINIS J. GARRETT, J.

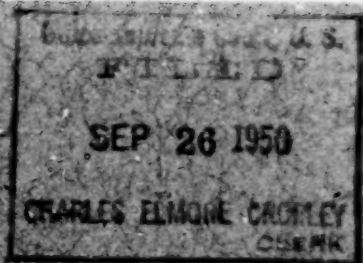
(S.) JOSEPH R. JACKSON,
JOSEPH R. JACKSON, J.

STEPHENS, J., dissents from the entry of a summary judgment against the defendants. In his view the defendants should be permitted to present their offered proof upon the issues of fact raised by their answers to the Government's complaint, and the court should then hear argument from counsel for the parties and, after weighing the evidence of both the Government and the defendants, make findings of fact and conclusions of law anew and render judgment according thereto.

(S.) HAROLD M. STEPHENS,
HAROLD M. STEPHENS, J.

Dated: NOVEMBER 7, 1949.

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No. 30

In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, APPELLANT

UNITED STATES GYPSUM COMPANY, ET AL,

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 30

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED STATES GYPSUM COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

PRIOR OPINIONS

The opinions rendered by the members of the three-judge district court on the Government's motion for summary judgment (*R.* 102-104) have not been reported. The opinion of the district court on appellees' motion to strike a paragraph of the amended complaint (*R.*¹ 369) and its opinion

¹ The printed record on the previous appeal in this case (No. 13, Oct. Term, 1947) is part of the record in the present appeal (*R.* 199). When the letter "R" is italicized, the reference will be to the record on the prior appeal, and when it is not italicized, the reference will be to the record printed on this appeal.

on appellees' motion to dismiss the complaint under Rule 41(b) of the Federal Rules of Civil Procedure (*R.* 3933) are reported, respectively, in 53 F. Supp. 889 and 67 F. Supp. 397. The opinion of this Court reversing the district court's judgment of dismissal is reported in 333 U. S. 364.

JURISDICTION

The judgment of the district court was entered on November 7, 1949 (*R.* 185-191). The petition for appeal was filed and allowed on January 6, 1950 (*R.* 194-195). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. Probable jurisdiction was noted on May 29, 1950 (*R.* 376).

QUESTIONS PRESENTED

This Court has adjudged that appellees have illegally restrained and monopolized interstate commerce in gypsum board by acting in concert to fix prices and to regiment their industry under patent licenses. It has also adjudged that the gypsum board patents of appellee United States Gypsum Company have been used as a means for thus illegally restraining and monopolizing commerce. The appeal presents the following questions as to the relief requisite to prevent further violations of the Sherman Act and to dissipate the effects of appellees' past illegal conduct:

1. Whether the judgment should prohibit appellees from acting in concert to fix prices in the gypsum board industry and from continuing, pursuant to such a price-fixing agreement, acts and practices which the appellees have used as means for effectuating price control and regimentation of trade in the gypsum board industry.

2. Whether the judgment should require appellee United States Gypsum Company to license its present and future gypsum board patents at reasonable royalty rates and upon other terms fair and reasonable to those licensed thereunder.

The other questions presented by the appeal are:

3. Whether the judgment should provide that representatives of the Department of Justice may, subject to appropriate limitations, inspect the books and records of the defendant companies relating to matters contained in the judgment and interview their officers and employees regarding such matters.

4. Whether the adjudication of violation of the Sherman Act should include the individual defendants as well as the defendant companies.

5. Whether the judgment should require appellees to pay all taxable costs of the proceeding or only 50% thereof.

STATUTE INVOLVED •

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, provides in part as follows:

Section 1 [as amended by the Act of August 17, 1937, 50 Stat. 693]. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * [15 U. S. C. 1.]

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * * . [15 U. S. C. 2.]

* * * * *

Sec. 4 [as amended by the Act of March 3, 1911, Sec. 201, 36 Stat. 1167]. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * * . [15 U. S. C. 4.]

STATEMENT

Prior Proceedings in the Case

This is a civil action instituted by the United States in 1940 under Section 4 of the Sherman Act. The complaint charged appellees, six corporations and seven individuals, with conspiring to fix prices on patented gypsum board and unpatented gypsum products, and otherwise to restrain and monopolize interstate commerce in gypsum board and other gypsum products, in violation of Sections 1 and 2 of the Sherman Act. An expediting certificate was filed under the Expediting Act of February 11, 1903, as amended, and a three-judge district court was appointed. On April 20, 1944, at the close of the presentation of the Government's evidence, the appellees moved to dismiss the complaint under Rule 41(b) of the Federal Rules of Civil Procedure upon the ground that on the facts and law the Government had shown no right to relief. On June 15, 1946, the district court held that this motion should be granted, and in August 1946 it filed findings of fact and conclusions of law and entered judgment dismissing the complaint.

On appeal, this Court unanimously reversed the judgment of dismissal and remanded the case for further proceedings in conformity with its opinion. *United States v. U. S. Gypsum Co.*, 333 U. S. 364. The Court's basic rulings were: (1) The industry-wide license agreements, entered into with knowl-

edge on the part of licensor and licensees of the adherence of others, with the control over prices and methods of distribution provided for and achieved through the license agreements and the price bulletins issued pursuant to these agreements, "fully" established concert of action, constituting conspiracy, to achieve ends prohibited by the Sherman Act. 333 U. S. at pp. 389, 393, 400. (2) Such conduct, regardless of motive, plainly violates the Sherman Act in the absence of sanction under patent law. *Id.*, at pp. 393, 400. (3) Patent exploitation of the kind undertaken by the defendants is "beyond any patent privilege." *Id.*, pp. 391, 400-401.

The Court, dealing with the question whether the defendants' conduct came within the rights of patentees as those rights were defined in *United States v. General Electric Co.*, 272 U. S. 476, said (p. 400):

That case gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized.

But the Court went further and held that even if only the central core of what the defendants had

done were given consideration, the *General Electric* case affords no cloak of immunity. It said (P. 401):

~~Even in the absence of the specific abuses in this case, which fall within the traditional prohibitions of the Sherman Act, it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices.~~

The grounds for this conclusion were summed up in these words (*ibid.*):

The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly.

The first of the foregoing quotations reflects the conclusions reached by the Court as to certain facts shown by the Government's documentary evidence. Earlier in its opinion the Court had stated that it unmistakably appeared from this evidence that the defendants had defined "in minute detail" both the prices and terms of sale for gypsum board, adopted a delivered price basing point system, specified board sizes, prescribed minimum quantities, regulated place of delivery, prohibited consignment sales, eliminated an important class of

jobbers, and attempted to stabilize the price of plaster, an unpatented gypsum product. 333 U. S. 364, at pp. 382-383, 398, 399.

Following remand of the case to the district court, the Government requested a pre-trial conference to determine what factual issues remained for trial and what categories of evidence the defendants intended to adduce (R. 2-3). At a hearing on this matter the district court, in order to have a basis for ruling on the future course of the proceeding, requested that the Government file a motion for summary judgment and that the defendants file a proffer of proof (R. 22-23, 26). Such motion (R. 144)² and such proffer (R. 145-160)³ were promptly filed. On June 29, 1948, the court heard argument on the Government's motion in relation to defendants' proffer (R. 30, 32-102), and orally ruled that the proffered proof gave rise

² The Government's motion prayed for summary judgment in its favor, or, if such judgment should not be rendered on the whole case or for all the relief asked and a further trial should be necessary, that the court ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just. See Rule 56(d) of Federal Rules of Civil Procedure.

³ Two of the defendant companies, National Gypsum Company and Ebsary Gypsum Company, Inc., and their respective presidents, defendants Melvin H. Baker and Frederick G. Ebsary, did not join in the proffer made by the other defendants (R. 31-32). The Celotex Corporation also filed a short supplementary proffer of proof (R. 31, 160-161).

to no genuine issue as to any fact material to an adjudication that the defendants had violated the Sherman Act, and that summary judgment should be granted (R. 102-103). Judge Stephens dissented from these rulings (R. 103-104, 191-194).

Thereafter the Government filed proposed findings of fact and conclusions of law (R. 207-249) and a proposed judgment (R. 250-259). Appellee United States Gypsum Company, which will sometimes be referred to as USG, filed, subject to its objection to entry of any judgment for the plaintiff (R. 163), proposed findings and conclusions (R. 359-373) and a proposed judgment (R. 354-359). Article VI of USG's proposed judgment imposed upon USG a limited requirement to license certain of its gypsum board patents (R. 358). The article provided for court approval of certain forms of license agreement, and provided that USG might satisfy its obligation to license by tendering an agreement containing the provisions of the applicable approved form of agreement (*ibid.*).⁴

On November 7, 1949, the district court, without making findings of fact or conclusions of law and without rendering an opinion, entered a final judgment (R. 185-191). It differed only in minor respects from the judgment which USG had pro-

⁴ USG filed forms of license agreement which it proposed that the court approve if it should adopt Article VI of USG's proposed judgment (R. 164-185).

posed and its principal provisions may be summarized as follows:

The "defendant companies," but not the individual defendants, are adjudged to have violated Sections 1 and 2 of the Sherman Act (Art. III).⁵ The patent license agreements which were in effect between USG and any other defendant at the time the Government's complaint was filed are declared null and void (Art. IV).⁶ Each defendant company is enjoined (1) from further performing any of the canceled license agreements, (2) from agreeing with another defendant for the purpose or with the effect of continuing or reviving "any monopolistic practice," and (3) from agreeing with any other defendant in restraint of trade and commerce in gypsum board among the states in the eastern territory of the United States "by license agreements to fix, maintain, or stabilize" the prices of such board or the terms or conditions of sale thereof (Art. V). Moreover, the prohibition as to restraint of commerce in gypsum board is limited to board which embodies an invention claimed in one or more of the license agreements which the judgment declared to be unlawful.⁷

⁵ "Defendant companies" are defined as the six corporate defendants plus Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company (Art. II, par. 1).

⁶ The judgment particularizes these agreements (Art. II, par. 4).

⁷ Paragraph (3) prohibits restraint of trade in "gypsum board." The prohibition has the narrow limits stated above, because of the definitions of Article II of the judgment. It is

The judgment orders USG to grant, upon application made within 90 days from the judgment's effective date, a non-exclusive license under USG's presently owned gypsum board patents, at a royalty not in excess of the royalty on the same article or process fixed in the license agreements canceled by the judgment (Art. VI). USG is permitted to satisfy this obligation by tendering a license agreement containing the provisions set forth in the forms of agreement "ordered filed herein," and "hereby approved" (Art. VIII). The forms of agreement which the court thereby approved provide for licensing under only nine patents (R. 165, 171, 175-176, 179-180, 185), and they are verbatim the forms of license agreements submitted to the district court by USG (R. 164-185, 194).

The approved forms of license agreement also give to USG a broad right to inspect and make copies of all books and records of the licensee relating to sale of gypsum board embodying any invention covered by the licensed patent or patents.

there provided (R. 187) that, as used in the judgment, "gypsum board" shall mean board "embodying any of the inventions or improvements set forth and claimed in any of the Patents"; "Patents" shall mean patents and patent applications owned by USG "which are described in the Patent Licenses, as hereinafter defined"; and "Patent License" shall mean the patent license agreements which were in effect between USG and each of the other defendant companies at the time that the Government's complaint was filed.

Each form of agreement contains substantially the following provision (R. 167, 172, 176-177, 181):

Licensor, or its duly authorized representative, shall have the right at all reasonable times to inspect the books of account and records of Licensee referred to in Paragraph 4 hereof, and to make copies thereof and memoranda therefrom, *provided, however*, that upon written request of Licensee, such examination shall be made by a certified public accountant agreed upon between the parties hereto * * *.

The judgment further provided that the defendant companies should pay 50% of the taxable costs of the proceeding (Art. X).

Following entry of the final judgment which we have described, both the Government and USG⁸ appealed to this Court. The basis of USG's appeal was that, on the record as it stood when the district court granted the Government's motion for summary judgment, there was substantial controversy between the parties as to facts material to the issue of defendants' violation of Sections 1 and 2 of the Sherman Act, and that the district court therefore erred in entering judgment against the defendants on such motion. On May 29, 1950, this Court entered an order dismissing USG's appeal. 339 U. S. 959.

The ground of the Government's appeal was that the final judgment of the district court failed to

⁸ The individual defendants Sewell L. Avery and Oliver M. Knode, who are officers of USG, joined in USG's appeal.

give adequate relief against the defendants. On May 29, 1950, this Court noted probable jurisdiction of the Government's appeal, and further ruled as follows (339 U. S. 960) :

Article III of the decree of the District Court of November 7, 1949, reading as follows: "The defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of sections 1 and 2 of the Sherman Antitrust Act," is affirmed. The corporate defendants and Samuel M. Gloyd, doing business as Texas Cement Plaster Company, are enjoined, pending further order of this Court, from (1) enforcing in any manner whatsoever the provisions of their current license agreements fixing, maintaining or stabilizing prices of gypsum board or the terms and conditions of sale thereof, and (2) from entering into or performing any agreement or understanding in restraint of trade and commerce in gypsum board among the several states in the eastern territory of the United States by license agreements to fix, maintain or stabilize prices of gypsum board or by license or other concerted action arranging the terms and conditions of sale thereof.

Judgment Provisions Requested on This Appeal

The Government is seeking particular modifications in the judgment entered by the district court

rather than blanket substitution of the judgment which it proposed in the district court. In order to give concreteness to the changes which we request and in order to put the matter before the Court in the form of a complete judgment, we have set forth in the Appendix (*infra*, pp. 65-75) a proposed judgment which contains the provisions sought by the Government. It follows the structure of the district court's judgment and, for the convenience of the Court, we herewith annotate it to the judgment entered below.

Articles I, IV, VII and X. These articles are the same as Articles I, IV, VII and IX, respectively, of the district court's judgment apart from substituting the word "judgment" for the word "decree."⁹

Article II. This defines, in the same manner as Article II of the district court's judgment, the words "defendant companies" and the license agreements which are declared illegal by Article I. It has a different definition of "patents" and

⁹ Article I of the proposed judgment sets forth the court's jurisdiction to act in the case. Article IV adjudges the illegality of USG's license agreements with other defendants. Article VII exempts from the judgment, aside from its compulsory licensing requirements, activities of the defendants authorized by any act of Congress. Article X reserves to the court jurisdiction to construe and enforce the provisions of its judgment.

Article VII was not assigned as error even though the Government is generally opposed to incorporating into a Sherman Act judgment exemption provisions of this kind, because they lead to uncertainty and ambiguity in the application of the obligations imposed by the judgment.

of "gypsum board," and it also defines "gypsum products." The defined words are used in Articles V and VI, and our proposed changes in definition are designed to enlarge the scope of the prohibitions or requirements of these articles. The proposed changes in Article II are therefore wholly ancillary to our proposed changes in Articles V and VI.

Article III. The adjudication of violation of the Sherman Act made therein is the same as that in Article III of the judgment below except that in our proposed article the adjudication applies to both the individual defendants and the defendant companies.

Article V. The injunctive provisions of this article are a substitute for those of Article V of the district court's judgment. The proposed substitute is based upon, and incorporates the substance of, Section V of the judgment proposed by the Government in the district court, as indicated in detail below.¹⁰

¹⁰Section V (R. 252-253) provided for enjoining the defendants from acting in concert to do any of the things described in 10 subparagraphs: Proposed Article V contains a broad prohibition of price-fixing agreements and six supplementary prohibitions. The Government believes that the initial, basic prohibition of Article V sufficiently covers subparagraphs 1 and 10 of Section V and, together with supplementary subparagraph 5, sufficiently covers subparagraphs 6 and 8 of Section V. The other subparagraphs of Section V are embodied in the subparagraphs of Article V as follows, the latter being shown in parenthesis: 2(1), 3(2), 4(4), 5(5), 7(3), 9(6).

Article VI. This article provides for compulsory licensing of USG's gypsum board patents and it is a substitute for the provisions of Articles VI and VIII of the district court's judgment. Its requirements are essentially those of Section VI of the judgment which the Government asked the district court to enter. See R. 254-256.

Article VIII. This article, which has no counterpart in the district court's judgment, provides that representatives of the Department of Justice may, subject to certain limitations, inspect the records of defendant companies and interview their officers and employees. It differs only verbally from Section XI of the judgment proposed by the Government in the district court. See R. 258.

Article IX. This differs from Article X of the judgment below only in that it requires the defendants to pay all, rather than 50%, of the taxable costs of the proceeding.

SPECIFICATION OF ERRORS TO BE URGED

The district court erred—

1. In failing to adjudicate that each individual defendant has violated Sections 1 and 2 of the Sherman Act.
2. In limiting the prohibitions of Article V (3) of its judgment to restraints of trade involving only "gypsum board" in the eastern United States and

in limiting these prohibitions to restraints of trade effected only by "license agreements."

3. In not enjoining any two or more defendants from agreeing, combining or conspiring with each other to eliminate price competition in the sale of gypsum board or gypsum products, to stabilize the prices thereof, to suppress any class of distributor thereof, or to suppress the production of unpatented gypsum products.

4. In limiting the requirement imposed upon United States Gypsum Company by Article VI (1) of its judgment to 90 days after the effective date thereof, and in limiting such requirement to the nine patents referred to in the forms of agreement which the court "approved" and "ordered filed herein" (Article VIII).

5. In not providing that each license granted pursuant to the requirements of Article VI (1) of the judgment shall be at a reasonable royalty, to be determined, in the event of disagreement, by the court.

6. In providing in Article VIII of its judgment that tender by United States Gypsum Company of a license containing the terms and conditions set forth in the applicable form of agreement which the court "approved" and "ordered filed herein" shall constitute compliance by United States Gypsum Company with the provisions of Article VI of the judgment.

7. In providing in the first of the license forms which the court approved that the licensee shall make a monthly report to United States Gypsum Company of the "quantity" of all gypsum board manufactured by it under the licensed patents, together with the "selling price" thereof, and that United States Gypsum Company may inspect the books and records of the licensee and make copies thereof, subject to the proviso that, upon the licensees' request, such examination shall be made by a certified public accountant.

8. In not entering judgment against the defendants for the full taxable costs of the proceeding.

9. In not including in its judgment provisions corresponding to those of Sections V, VI, and XI of the judgment proposed by the plaintiff.

SUMMARY OF ARGUMENT

I

1. It is established that when the defendants in a proceeding under Section 4 of the Sherman Act are found to have violated the Act, the judgment entered against them shall be of sufficient breadth and specificity to provide effective safeguards against continuation or renewal of their past illegal conduct. *Local 167 v. United States*, 291 U. S. 293. The prohibitions of the judgment are therefore not to be confined to acts of the precise kind found to have been committed, but should embrace acts of a similar kind and character and the means by which

defendants' unlawful restraints or monopolization have been achieved. *International Salt Co. v. United States*, 332 U. S. 392.

2. The district court's judgment, tested by these accepted doctrines, is patently insufficient. Of its three injunctive provisions, the first merely bars the carrying out of the patent license agreements which the judgment cancels. The second, directed against "any monopolistic practice," is wholly ineffective as a deterrent because of its generality and indefiniteness; citation for contempt thereof would practically entail retrial of a Sherman Act case. The third is inadequate because it prohibits only price fixing by license agreements on gypsum board embodying the invention of particular USG patents and sold in the eastern part of the United States. It would not prevent appellees from fixing prices by means other than that hitherto employed, or on gypsum board not embodying the particular inventions, or on other gypsum products, or on gypsum products (including board) sold in the Pacific Coast area.

3. The judgment which the Government proposes would prohibit appellees from participating in any agreement or understanding to fix or stabilize prices or terms of sale of gypsum products by concert of action of any kind. It would thus close the door to price fixing through means other than patent license agreements, to price fixing on gypsum products other than board, and to price fix-

ing outside of "eastern territory." It would also prohibit engaging in, pursuant to price fixing, acts and practices which the appellees have used in support and furtherance of price control and regimentation of trade.

II

The compulsory licensing provisions of the district court's judgment are wholly inadequate. It requires such licensing only as to those who apply ~~therefor~~ within 90 days of the judgment's effective date and only as to nine patents of USG, four of which will have expired by the end of 1950. The royalty to be paid is that fixed for the particular patent or patents in the price-fixing licensing agreements which the judgment cancels. It provides for licensing only upon terms respecting inspection of the licensee's books and records by USG which are competitively disadvantageous to USG's licensees.

In the circumstances of this case there is clear need for compulsory licensing which, unlike that provided by the district court's judgment, is more than *pro forma*. USG is the dominant producer of gypsum board and it has utilized patents, which ostensibly controlled the technology of the gypsum board industry to maintain "rigid control over the prices and terms of sale of virtually all gypsum board." Its unvarying policy has been to use its patent power to this end and, unless the judgment commands otherwise, it will continue to use its patent power acquired as a part of the conspiracy, to exclude others from the industry.

The compulsory licensing provisions of our proposed judgment are designed to dissipate the effects of the appellees' long-continued illegal restraint of trade. It would require USG to license its present and future gypsum board patents at a reasonable non-discriminatory rate of royalty and on terms otherwise fair and reasonable to USG's licensees. Such requirements have the support of both precedent and principle. Where violation of the Sherman Act has been grounded on the defendants' misuse of patents, compulsory licensing of present and future patents is an appropriate remedy. *Hartford-Empire Co. v. United States*, 323 U. S. 386; *United States v. National Lead Co.*, 332 U. S. 319. Application of this remedy comes within the general principle that the courts' duty to enforce the statute may require undoing the effects of the past illegal conduct in order effectually to neutralize its continuing operating force. As this Court has said, a public interest to be served by suits under Section 4 of the Act is that they "effectively pry open to competition the market that has been closed by defendants' illegal restraints." *International Salt Co. v. United States*, 332 U. S. 392, 401.

III

The district court rejected the Government's request that it provide in its judgment that representatives of the Department of Justice may inspect, subject to appropriate limitations, the books

and records of defendant companies relating to matters covered by the judgment and may interview their officers and employees as to such matters. Such authorization, which we ask to have included in the judgment, is substantially identical with the one which this Court considered and approved in *United States v. Bausch & Lomb Co.*, 321 U. S. 707, and again approved in the *Hartford-Empire* case, *supra*.

IV

The district court's adjudication of violation of the Sherman Act does not include the individual defendants, who helped to formulate and carry out the unlawful scheme which the judgment condemns. If the judgment below is left unchanged it will stand as a dangerous precedent for the false proposition that the guilt of a corporation somehow insulates from the prohibitions of the Act officers of the corporation who have been parties to the violation. We ask that the adjudication of violation of the statute include the individual defendants.

V

The district court's judgment provides that the defendant companies shall pay half the taxable costs of the proceeding whereas under our proposed judgment they would pay the full taxable costs. The Federal Rules of Civil Procedure provide that costs are to be allowed "as of course" to the pre-

vailing party unless its conduct of the litigation has unnecessarily increased the costs. Here there have been no acts of this kind by the Government which would warrant departure from the usual rule for taxation of costs, and whatever special equities exist as between the parties run in favor of the Government.

ARGUMENT

Introductory

The relief which the Government asks this Court to approve differs substantially from that granted by the district court. We submit that there is ample warrant for the recasting of relief which we propose.

In a proceeding of the kind here involved the district court is vested with a wide range of discretion in moulding the judgment to the exigencies of the particular case, and where the findings of violation are sustained on appeal the appellate court will not recast the judgment except upon a showing of abuse of discretion. But in cases where the judgment entered below does not adequately protect the public interest, this Court has not hesitated to direct a revamping of the judgment.¹¹ *Standard Oil Co. v. United States*, 221 U. S. 1, 78-82; *United States v. American Tobacco Co.*, 221 U. S. 106, 184-

¹¹ Modification is likewise directed in the converse situation, where the provisions of the district court's judgment are found to exceed the limits of appropriate relief and to be essentially punitive in character. *Hartford-Empire Co. v. United States*, 323 U. S. 386, 410-435.

188; *United States v. Crescent Amusement Co.*, 323 U. S. 172, 185-187; *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 161-166.

We later point out gross and patent inadequacies in the judgment entered in the present case (*infra*, pp. 27-33), which demonstrate that there was an abuse of discretion calling for modification of the judgment. But we also submit that, because of the basis upon which the district court framed its judgment, the usual reasons for according great weight to the trial court's conclusions respecting relief are not applicable here. The district court believed that, upon grant of motion for summary judgment, relief must be confined to what the court regarded as the core of appellee's illegal conduct—price fixing by patent licenses (*infra*, pp. 29-32). Accordingly, apart from conduct of this precise form and character, the court made no discretionary determination as to the relief requisite to prevent appellees from further violating the Act and to undo the effects of their past illegal conduct.

I

Effective Relief Requires That Appellees Be Enjoined from Acting in Concert To Fix Prices in the Gypsum Board Industry and from Continuing, Pursuant to Such a Price-Fixing Agreement, Acts and Practices Used by Appellees as Means for Effectuating Price Control and Trade Regimentation

1. *The General Principles Applicable to Relief*

This Court has repeatedly declared the principles to be applied in determining relief in a suit

brought by the United States under Section 4 of the Sherman Act to "prevent and restrain" violations of the Act. The primary objective in such a case is to assure, so far as may be practicable, that the wrongdoers shall not again violate the statute. The acts proscribed by the judgment must be charted with sufficient definiteness to provide a true guide to future conduct. But the courts recognize that illegal restraints and monopolizations of trade may be achieved in many ways. The prohibitions of the judgment are therefore not to be confined to the precise conduct held to have been unlawful, and should embrace means used by the defendants in achieving their illegal ends.

In *Local 167 v. United States*, 291 U. S. 293, 299, the Court said:¹²

The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing its provisions doubts should be resolved in favor of the Government and against the conspirators.

Where a violation of the Sherman Act has been found, the court is "bound to frame its decree so as

¹² This Court has frequently referred with approval to the principles set forth in the *Local 167* case relative to relief. See *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 461; *National Labor Relations Board v. Express Pub. Co.*, 312 U. S. 426, 437; *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 726; *Hartford-Empire Co. v. United States*, 323 U. S. 386, 409; *May Dept. Stores Co. v. National Labor Relations Board*, 326 U. S. 376, 391.

to suppress the unlawful practices and to take such reasonable measures as would preclude their revival." *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 461. Likewise the court should suppress, in the absence of persuasive countervailing reasons, "the means by which the unlawful restraint was achieved" (*ibid.*). Merely to prohibit the precise scheme used by the defendants to effect an illegal restraint of trade is ineffectual to prevent future restraints and therefore insufficient. *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 308. "The injunction should go further, and enjoin defendants from entering into or acting under any similar agreement in the future. In other words, the relief granted should be adequate to the occasion." (*Ibid.*). Accord, *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 727.

In the recent case of *International Salt Co. v. United States*, 332 U. S. 392, 400, the Court said:

When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed. The usual ways to the prohibited goal may be blocked against the proven transgressor and the burden put upon him to bring any proper claims for relief to the court's attention.

While a court may not "impose penalties in the guise of preventing future violations," this limitation does not mean that the judgment "need deal

only with the exact type of acts found to have been committed or that the Court should not, in framing its decree, resolve all doubts in favor of the Government, or may not prohibit acts which in another setting would be unobjectionable." *Hartford-Empire Co. v. United States*, 323 U. S. 386, 409.

A further aspect of relief, undoing the effects of the defendants' past misconduct, will be discussed in connection with the obligation to be imposed upon USG to grant licenses under its gypsum board patents. See *infra*, pp. 43-50.

2. *Inadequacy of the Injunctive Provisions of the District Court's Judgment*

Patently the district court's judgment does not conform to the accepted doctrines concerning relief to which we have referred. The injunctive provision (Art. V, R. 189) merely enjoins appellees from (1) carrying out their existing patent-license agreements, (2) agreeing to continue or revive "any monopolists practice," and (3) agreeing to restrain interstate commerce in the eastern United States in gypsum board (which by definition, Art. II, R. 187 means board made under certain USG patents), by license agreements to fix or stabilize prices of such board.

The first prohibition is an unimportant addendum to cancellation of appellees' existing license agreements. The second is ineffective as a deterrent. It is couched in such general terms that con-

tempt proceedings would involve the extended proof and trial required to establish a substantive violation of the Sherman Act. In *United States v. Crescent Amusement Co.*, 323 U. S. 173, 186, this Court gave as a reason for rejecting a provision of the judgment entered by the district court: "The generality of this provision of the decree bids fair to call for a retrial of a Sherman Act case any time a citation for contempt is issued." Cf. *International Salt Co. v. United States*, *supra*, at p. 400.

The third prohibition is plainly inadequate. Since it is limited to restraint of trade in the eastern United States in gypsum board which embodies an invention claimed in particular USG patents, it does not preclude price fixing through patent license agreements in gypsum board not embodying such an invention, or in gypsum board marketed in the western United States, or in other gypsum products made and sold by the appellees. But an even more serious deficiency is that the prohibition leaves appellees free to enter into price-fixing agreements of any kind or variety provided that patent licenses are not the medium for price fixing, and even leaves appellee free to employ the specific practices by which they have implemented price control and trade regimentation. Thus the judgment interposes no bar to the concerted adoption and enforcement of a host of rules designed to restrain price competition and stabilize prices, by action similar

to that condemned after lengthy proceedings in *Sugar Institute, Inc. v. United States*, 297 U. S. 553. Nor would the judgment prohibit concerted adherence to and policing of a delivered price basing point system, such as was held illegal after protracted proceedings in *Federal Trade Commission v. Cement Institute, Inc.*, 333 U. S. 683. Appellees have been found by this Court to have engaged in both of these types of practices, and appellees, in opposing summary judgment, have not controverted the Court's findings with respect to these practices (*infra*, pp. 40-43).

The district court did not state the reasons which led it to adopt injunctive provisions of such narrow scope. But observations made by individual members of the court ¹³ and its adoption of a judgment generally conforming to that proposed by the present appellees (*supra*, p. 9) make it evident that the court believed that, on grant of summary judgment, relief should be confined to the precise medium used by appellees in fixing prices and regimenting trade, namely, common acceptance of licenses (under USG gypsum board patents) containing price-fixing provisions.

In the court below appellees, in urging that the relief granted must be thus narrowly circumscribed, contended that price fixing through patent licenses was the single basis for summary judgment, and that the factual premises for any broader relief

¹³ R. 103, 111, 113, 119-120, 141.

were put in issue by their proffer of proof and must therefore be regarded as not proved for the purposes of summary judgment.

We submit that this contention is unsound both in fact and in law. Appellees' basic offense was concert of action in fixing prices and in regimenting trade in the gypsum board industry. Under the patent license agreements USG acted as the common delegatee of the other defendants. The specific acts and practices which the appellees employed to implement price fixing and regimentation of distribution were established by documentary evidence adduced at the original trial. As we show later (*infra*, pp. 40-43), that proof stands unchallenged insofar as the broader injunctive relief which the Government seeks may require factual support additional to that furnished by proof of concert of action in fixing prices and regulating distribution on an industry-wide scale. Appellees' proffer did not question any of the Government's documentary proof, did not impeach the testimony of any of its witnesses, and did not controvert those acts and practices of the appellees which are relevant to the relief provided in the judgment proposed by the Government.

Furthermore, the proffer of proof does not qualify the force of the Government's original evidence because the proffer was not supported by affidavits.¹⁴ Rule 56(c) of the Federal Rules of

¹⁴ In the district court the government urged that the proffer, in the absence of affidavit, raised no issue of fact (R. 89).

Civil Procedure provides that when a motion for summary judgment is filed the adverse party may serve opposing affidavits and that the judgment sought shall be rendered if the pleadings, depositions, and admissions on file "together with the affidavits, if any," show that there is no genuine issue as to any fact material to the judgment sought by the moving party. The importance of this requirement that the opposing party furnish affidavit support for the factual issues which it raises is emphasized by Rule 56(e), which provides that supporting and opposing affidavits shall be made "on personal knowledge," shall set forth facts which would be admissible in evidence, and shall show affirmatively that "the affiant is competent to testify to the matters stated therein." The importance of the requirement is further indicated by Rule 56(f) providing that the court may refuse the application for judgment should it appear from the "affidavits" of the opposing party that he cannot for reasons stated present "by affidavit" the facts essential to justify his opposition.

But in any event appellees' contention is unsound in law. Once the basic price-fixing conspiracy was proved, the relief to which the Government was entitled was not limited to an injunction against repetition of the precise details of the violation found. As the cases discussed (*supra*, pp. 25-27) hold, the judgment in a civil Sherman Act case should bar the defendants from using related or

similar means for achieving the unlawful ends which the court has found and adjudged—in this case, concerted fixing of prices and regulation of distribution in the gypsum industry.

The usual principles governing relief apply to a case decided on motion for summary judgment. *International Salt Co. v. United States*, 332 U. S. 392. The Court there held that when summary judgment is entered against the defendants in a proceeding under the Sherman Act, the usual rule prevails that the judgment should be so framed that it will bar further violation of the statute not only by the means found to have been employed but also by “untraveled roads” to the same end.

Consideration of the facts presently involved confirms the force and application of the holding in *International Salt*. Through common agreements with USG, appellees have fixed gypsum board prices and terms of sale in minute detail, and in pursuit of these ends they have concertedly engaged in many collateral activities. They have zealously and rigorously suppressed price competition in an entire industry. Accordingly the judgment entered against them should be sufficiently comprehensive to provide reasonable assurance that proven violators of the statute will not again transgress.

The fact, if we assume it to be a fact, that appellees believed that their acts were within the shelter of rights given by patent law is not a ground for

narrow and restricted prohibitions. Certainly appellees pushed their claims of patent privilege to extreme, if not reckless, lengths. They are not to be penalized because of their mistaken belief in the scope of their patent privileges, but on the other hand this belief is not ground for favored treatment. But the important point is that the prohibitions to which they should be subjected must be directed toward securing compliance with the law which appellees did violate.

3. *Adequate Relief Requires Injunctive Provisions of the Scope Proposed by the Government*

The judgment which the Government proposes would enjoin the defendant companies from making or carrying out any agreement or understanding to fix, maintain or stabilize the prices or terms or conditions of sale of gypsum products by means of patent licenses or other concerted action, and from continuing, pursuant to such an agreement or understanding, certain acts or practices which the appellees have employed in effectuating price control and trade regimentation (Appendix, *infra*, pp. 69-70).

Enjoining Price Fixing. In view of the earlier discussion of the principles governing relief and in view of what we have said about opportunities for further violation of the Act which are left open by the judgment entered in the court below, we believe it unnecessary to elaborate the reasons in

support of enjoining appellees from fixing prices by concert of action. Such concert of action is the epitome of appellees' offense, as adjudicated by the district court by Article III of its judgment and by this Court by affirming that article. Obviously the judgment should proscribe action of this kind, and not merely prohibit price fixing through patent licenses—the particular instrumentality utilized to achieve that end.

This view as to relief is implicit in the injunction *pendente lite* issued by this Court on May 29, 1950 (338 U. S. 960). The defendant companies were thereby enjoined from “entering into * * * any agreement * * * in restraint of trade * * * in gypsum board among the several states * * * by license agreements to fix, maintain or stabilize prices * * * or by license *or other concerted action* arranging the terms and conditions of sale thereof.” [Italics supplied.]

We comment on two subsidiary aspects of our proposed general injunctive provision against price fixing, its geographical scope and the products to which it applies.

While the Government's complaint charged violation of the Sherman Act with respect to interstate commerce among the states east of the Rocky Mountains (R. 3, 9-10) and while we concede that the district court's adjudication of violation of the Act in Article III of its judgment is properly limited to commerce in this area, we submit that

the injunction against price fixing should apply to interstate commerce generally. The situation might be different if any real significance attached to the geographical scope of the trade restraints charged and found. But here geographical scope signifies merely that, the so-called eastern territory (comprising most of the United States) was appellees' principal marketing area at the time the complaint was filed and that at that time no Pacific Coast producer was a licensee of USG. *Non constat* that the Pacific Coast will not later become an important sales outlet for appellees or that Pacific Coast manufacturers will not become USG licensees. It would be an absurd situation, we submit, if the injunction left appellees free to enter into a network of price-fixing patent licenses with respect to sales in the Pacific Coast area.

The other possibly controversial aspect of the Government's proposed injunction against price fixing is that it applies to gypsum products as defined in the proposed judgment¹⁵ rather than merely to gypsum board. Appellees fixed prices on the various kinds of gypsum board, but unpat-

¹⁵ The proposed judgment (Art. II, par. 4) defines "gypsum products" as meaning gypsum board as defined in the judgment, and plaster, block, tile, and Keene's cement made from gypsum (Appendix, *infra*, p. 66).

¹⁶ Appellees were making and fixing prices on the various kinds of gypsum board included within the definition. See price bulletin of April 1, 1938, set forth in Ex. No. 7 attached to Government's complaint (R. 94). They made and sold the other gypsum products included within our definition. See appellees' brief on the prior appeal (p. 5).

ented gypsum products, particularly gypsum plaster, were also within the orbit of their price-fixing activities. On the prior appeal this Court said (333 U. S. at p. 386):

Board and plaster were usually sold together and the defendants claim that cutting of prices on plaster, in sales of the two together, operated in effect as a rebate on the price of board, and hence was legally subject to control. The government introduced in evidence a large number of complaints to Board Survey by licensees as to their competitors' failure to maintain prevailing prices on plaster. A bulletin provision forbidding rebates and allowances stated that a sale of board at posted prices would be in violation of the license if the licensee reduced the price of other products, and Board Survey in summarizing violations of bulletin terms revealed through audit of the licensees' books listed "Price concessions on other material in connection with Board Sales."

Appellees' proffer of proof (R. 145-160) denied none of the facts thus stated. It therefore stands uncontroverted that appellees have taken, under claim of right, concerted action directly tending to stabilize prices of unpatented gypsum products. These facts furnish ample basis for including such products in the prohibition against price-fixing agreements.¹⁶

¹⁶ "The bulletin provision and complaints by licensees addressed to Board Survey convince us that the defendants

Local 167 v. United States, 291 U. S. 293 is direct authority for the proposition that injunctive relief need not be limited to the precise commodities as to which coercion has been practiced. The appellants there sought elimination of a provision of the district court's judgment which prohibited them from coercing marketmen "to buy poultry, poultry feed, or other commodities necessary to the poultry business" from particular sellers. The fact that the defendants had coerced marketmen to buy coops from a particular company was held to be adequate warrant for the foregoing prohibition. This Court said (p. 299) :

The lack of specific evidence that coercion has been practiced or is threatened in respect of every detail or commodity ~~is~~ no adequate ground for striking out the clause or for limiting it to a mere specification of the coops. Having been shown guilty of coercion in respect of the coops in which poultry is kept and fed, appellants may not complain if the injunction binds generally as to related commodities including feed and the like. When regard is had to the evidence disclosing the numerous purposes of the conspiracy and the acts of coercion customarily employed by defendants, it is plain that the clause referred to cannot be condemned as unnecessary or without warrant.

attempted to stabilize plaster prices, and the fact that plaster prices were stabilized only when plaster was sold in conjunction with board appears to us to be immaterial." 333 U. S. at p. 399.

In *United States v. Crescent Amusement Co.*, 323 U. S. 173, 187-188, this Court sustained, over defendants' objection, an injunction which prohibited them from making film-licensing franchises with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them, and from entering into "any similar combinations and conspiracies having similar purposes and objects." The present appellees, having at least engaged in a combination to fix or stabilize gypsum board prices, may be enjoined from engaging in a "similar" combination having "similar purposes," i.e., to fix ^{on} stabilize prices of other gypsum products.

Enjoining Specific Practices. The judgment which we propose would enjoin certain specified practices when engaged in "pursuant to" a price-fixing agreement (Appendix, *infra*, pp. 69-70). Accordingly, these prohibitions, like those of the order of the Federal Trade Commission approved in *Federal Trade Commission v. Cement Institute, Inc.*, 333 U. S. 683, apply only to concerted activities.¹⁷

The practices proposed to be prohibited have

¹⁷ In the *Cement Institute* case the prohibiting paragraphs of the Commission's order were preceded by a preamble which directed the respondents to cease and desist from participating in any planned common course of action, agreement or understanding "to do or perform any of the following things." 333 U. S. at p. 728.

been used as means for carrying into effect a tight and monopolistic control over prices in the gypsum board industry (*infra*, pp. 40-43). It is established that where violation of the statute is found in a suit by the Government to "prevent and restrain" violations of the Sherman Act, the judgment should prohibit practices employed in effectuating the defendants' restraint or monopolization of trade. This view is so generally accepted that we deem it sufficient to refer, by way of illustration, to the provisions of the judgment which were affirmed in *Sugar Institute, Inc. v. United States*, 297 U. S. 553. In that case defendants' dominant purposes were to create and maintain a uniform price structure, to keep refined sugar prices relatively high as compared with raw sugar prices, to limit or suppress various contract terms and conditions, and to make as certain as possible that no secret price concessions should be granted. 297 U. S. 553, at p. 577. The district court's judgment included "forty-five specifications of prohibited action," and of the 45 this Court set aside only three (*id.*, 602-603). The practices prohibited by the judgment included regulating the conduct of brokers and warehousemen; preventing freight absorptions; agreeing to sell only at delivered prices; limiting the number of consignment points; restricting or prohibiting long-term contracts, quantity discounts, "tolling," and private brands; collecting and disseminating

statistical information not made available to others (*id.*, 586-597).¹⁸

The practices covered by the six subparagraphs of Article V of our proposed judgment have been concertedly used by appellees as an adjunct to and in support of price control and regimentation of trade.

Subparagraphs 1 and 2 deal with the same problem. The former would enjoin appellees from making uniform the kinds of gypsum products manufactured or sold or the method of manufacturing, selling, packaging, shipping, delivering or distributing such products. The latter would enjoin appellees from achieving the same end by negative action, that is, by refraining from the manufacture or sale of any type or variety of gypsum products or the method of manufacturing, selling, packaging, etc., such products.

It stands admitted that appellees engaged in practices of this nature. Their proffer of proof did not deny the following facts stated by this Court on the prior appeal as to requirements of the price bulletins issued by USG (333 U. S. 364, at pp. 382-383):

The freight was to be computed on specified uniform billing weights, in order to prevent variations in freight arising from the differ-

¹⁸ It was held in *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 461, that the judgment "properly suppressed the means by which the unlawful restraint was achieved" even though such means "had been or might continue to be used for some lawful purposes."

ences in weight of board made by different manufacturers, and each licensee was directed to charge exactly the same switching, cartage, and extra delivery charges. Specified board sizes and minimum quantities were prescribed, * * * regulations were prescribed as to the size, quantity and markings of gypsum board used for packing shipments, granting of long-term credit was prohibited, sales on consignment were enjoined and licensees were forbidden to deliver board directly to a building site.

Most of these facts were also conceded by appellees in their brief on the prior appeal (pp. 18-19).

Subparagraphs 3 and 4 likewise deal with a common problem. The former prohibits agreeing upon any basis for selecting or classifying purchasers and the latter prohibits refraining from selling to any purchaser or class of purchasers. Such practices have been pursued in furtherance of appellees' schemes to regiment the industry. On the prior appeal this Court said that USG in 1930 had ordered elimination of the jobbers' discount and that, in consequence, those whom the license agreements defined as jobbers "were eliminated" (*id.*, p. 385).¹⁹ The Court also said since the appellees

¹⁹ "Jobbers" were defined in the license agreements as "those who do not manufacture but buy and sell plasterboard or gypsum wall board in straight cars or in mixed cars with other building material and who do not sell at retail" (R. 78).

Since jobbers buy for purposes of resale, elimination of their discount would obviously put them out of business. When all others can purchase at a price as low as that at which they purchase, there is no profit margin to cover the expense of carrying on their business.

were parties to a "common scheme to stabilize the industry," and since jobbers were eliminated in furtherance of that scheme, it was unnecessary to consider or determine the specific intent of each licensee in this connection (*id.*, pp. 397-398).

Appellees' proffer of proof does not deny that the license agreements clothed USG with power to take action binding upon all of its licensees or that USG, in exercise of this power, eliminated the jobbers' discount and thereby brought about the elimination of jobbers.²⁰

Subparagraph 5 would prohibit appellees from agreeing upon or adhering to any basing point delivered price system. This prohibition is directed against a course of action which the appellees concededly adopted and followed. Their proffer of proof does not deny the following facts stated by this Court on the prior appeal (*id.*, p. 382):

The bulletins adopted a basing point system of pricing, according to which each licensee was required to quote a price determined by taking the mill price at the nearest basing point and adding the all rail freight from the basing point to the destination.

Subparagraph 6 would prohibit appellees from policing, investigating or checking the prices or the terms or conditions of sale of gypsum products.

²⁰ Compare paragraphs 56 and 57 of appellees' proffer (R. 158-159).

Their proffered proof did not deny the following facts found to be shown by the evidence when the case was here before (*id.*, p. 384):

In order to insure compliance with the price bulletins, United States Gypsum established a wholly owned subsidiary in 1932 named Board Survey, Inc. Licensees were invited to send in complaints as to violations of pricing bulletins to Board Survey and that organization forwarded the complaints to the alleged delinquent licensees. Board Survey was authorized to make a thorough check-up of all reported violations and to take such action as it might deem necessary or proper to protect United States Gypsum's rights under the license agreements and patents. * * * Meetings of licensees were held at which doubtful provisions of the price bulletins were explained.

II

Effective Relief Requires Compulsory Licensing of USG's Gypsum Board Patents at Reasonable Royalty Rates and Other Terms Fair to Its Licensees

The basic requirement of Article VI of the judgment proposed by the Government is that USG grant to any applicant a non-exclusive license at a reasonable non-discriminatory rate of royalty under any or all of USG's present and future gypsum board patents²¹ (Appendix, *infra*, p. 70).

²¹ The article provides, however, that after five years from the judgment's effective date USG may apply to the district court for an order excluding from the obligation to license all patents which it acquires subsequent to such application. See Art. VI, par. 6, Appendix, *infra*, p. 72.

We submit that such relief is required by principles which have long been accepted.

As early as 1911 this Court held that where, as in this case, unlawful monopolistic power had been acquired and had been exercised for a period of many years, the duty of the courts to enforce the statute requires "the application of broader and more controlling remedies" than merely to forbid "the doing in the future of acts like those * * * done in the past." *Standard Oil Co. v. United States*, 221 U. S. 1, 77-78. In that situation it becomes essential also to exert "such measure of relief as will effectually * * * neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about." (*Ibid.*).

"Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience." *United States v. Crescent Amusement Co.*, 323 U. S. 173, 189. If the judgment merely forbade a repetition of the illegal conduct, those who had violated the Act "could retain the full dividends of their monopolistic practices." *Schine Theatres v. United States*, 334 U. S. 110, 128. "Such a course would make enforcement of the Act a futile thing unless perchance the United States moved in at the incipient stages of the unlawful project." (*Ibid.*). "A public interest served by"

civil suits by the Government to enforce the Act "is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints." *International Salt Co. v. United States*, 332 U. S. 392, 401. If the judgment which is entered "accomplishes less than that" it falls short of achieving the statutory objective (*ibid.*).

In cases such as the present where the defendants' violation of the statute has been grounded on misuse of patents, this Court has applied the foregoing principles by requiring the defendant patentee or patentees to license their patents to others upon terms reasonably safeguarding the interests of those licensed thereunder, including payment of a reasonable royalty for licensed patents. *Hartford-Empire Co. v. United States*, 323 U. S. 386; *United States v. National Lead Co.*, 332 U. S. 319. The former case upheld such compulsory licensing as to both presently-owned and subsequently-acquired patents,²² and the latter case upheld this requirement as to both the defendants' existing patents and those acquired by them within five years from the date of judgment.²³

In the circumstances of the instant case it is unnecessary for the Government to contend that when-

²² See paragraphs 24(a) and 24(b) of the district court's judgment as summarized by this Court and affirmed with modifications (323 U. S. at pp. 413, 417-418).

²³ See paragraph 7 of the district court's judgment read in conjunction with the definition of patents in paragraph 4 of the judgment (332 U. S. 319, note 4, at pp. 330, 332).

ever a defendant's violation of the Sherman Act has involved misuse of patents, compulsory patent licensing is a necessary element of relief. Here the need for such a requirement is clear. USG is the dominant factor in the industry.²⁴ By means of patents which ostensibly controlled the technology of the industry, it has "maintained rigid control over the price and terms of sale of virtually all gypsum board" (333 U. S. at p. 371). If the judgment allows USG freedom to license or not to license its patents, USG will remain clothed with power to refuse licenses under its patents and to use the threat of costly patent litigation to exclude others from the industry.

These are consequences which the judgment should guard against even if they were regarded as mere potentialities. But they are much more than this. It has been USG's consistent policy to license its patents only if the licensee would accept a license giving USG the right to fix the licensees' sales prices.²⁵ This Court has recently pointed out that it need not be assumed "contrary to common

²⁴ In 1939, the year before the Government's complaint was filed, it sold 55% of all gypsum board in the eastern area. 333 U. S. at p. 368.

²⁵ Appellees' brief on the prior appeal to this Court stated (p. 90) that Avery, chairman of USG's board of directors, in negotiating settlement of patent litigation with Beaver Products Company (subsequently acquired by appellee Certain-teed Products Corp.) and the grant of a license to Beaver under USG's closed-edge patent, specified the terms of settlement, one of which was "the right in USG to fix the prices of gypsum board made by Beaver" under USG's patent. The brief then states: "From that time forward those were the same unyielding terms of Avery and USG for any and all of

experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do." *International Salt Co. v. United States*, 332 U. S. 392, 400.

Neither USG nor the court below has denied the need for compulsory license of some sort.²⁶ But the licensing required is insufficient to open up USG's gypsum board patents to newcomers. In the first place, the obligation to license is limited to nine patents (*supra*, p. 11), and of these nine patents, two have already expired, two more will expire by the end of 1950, one will expire early in 1951, and of the other four patents that with the longest life will expire on May 11, 1954.²⁷ In the

the companies in the industry. * * * If any company wanted a license on those terms it got one."

The substance of these statements is repeated in paragraph 12 of appellees' proffer of proof (R. 147-148).

²⁶ The form of judgment submitted by USG provided for licensing its co-defendants under the nine patents covered by the forms of license agreements which USG submitted to the court (R. 358).

²⁷ The following shows the expiration dates of the nine patents:

Patent Number	Expiration Date
1,890,418	December 6, 1949 (R. 185)
1,914,345 (R. 179)	June 12, 1950*
1,934,174	November 7, 1950 (R. 185)
1,938,354 (R. 171)	December 5, 1950*
1,946,056	February 6, 1951 (R. 176)
2,015,817	October 1, 1952 (R. 185)
2,017,022	October 8, 1952 (R. 165)
2,079,338	May 4, 1954 (R. 165)
2,080,009	May 11, 1954 (R. 165)

* The record does not show the expiration dates of Patent Nos. 1,914,345 and 1,938,354, but they in fact expire on the dates given above.

second place, the judgment requires licensing only if application therefor is made within 90 days from the judgment's effective date (R. 189). The 90-day time limitation makes compulsory licensing a practical nullity as far as any newcomer to the business is concerned, since the serious practical problems involved in embarking upon the manufacture of gypsum board can hardly be resolved within the brief period allowed by the judgment. In the third place, the judgment does not properly safeguard the rights of licensees with respect to the terms and conditions of the license, including the rate of royalty to be paid. See *infra*, pp. 51, 56.

Clearly more compelling reasons for compulsory licensing exist here than in the *National Lead* case *supra*. The basic violation there was a so-called "international cartel" which allocated world markets, barred foreign concerns from selling in this country, and barred the defendants from selling in foreign countries. The judgment provided effective relief against such restraints and monopolization when it struck down the cartel agreements and enjoined their continuation or renewal. Compulsory licensing constituted relief designed to prevent barriers to competition in the field of domestic production and commerce, and in this field the defendants' restraints were minor compared to those of the present appellees. The cross-licensing patent agreements entered into between National Lead and Du Pont did not contain price

restrictions, there was no allocation of territory or customers between them, they actively competed for customers, and although they sold for identical prices there was no evidence that such price identity was the product of agreement or collusion. See 332 U. S. at pp. 346-347.

Our proposed judgment, like the judgments approved in the *Hartford-Empire* and *National Lead* cases, provides for compulsory licensing of subsequently acquired patents.²⁸ This requirement is designed to prevent USG from using such patents to prevent competition from developing. But our proposed judgment, notwithstanding the broader scope of the judgment approved in *Hartford-Empire* (see *supra*, p. 45), does not contemplate that the obligation to license shall extend to pat-

²⁸ In most of the judgments entered by consent in Sherman Act cases in which compulsory licensing has been required the requirement has included patents acquired subsequent to the entry of judgment. *United States v. General Electric Co.* (D. N.J., 1946), CCH Trade Reg. Serv. ¶ 57448; *United States v. Diamond Match Co.* (S.D.N.Y., 1946), *id.* ¶ 57456; *United States v. Technicolor, Inc.* (S.D. Calif., 1950), *id.* ¶ 62586; *United States v. American Can Co.* (N.D. Calif., 1950), *id.* ¶ 62679; *United States v. Continental Can Co.* (N.D. Calif., 1950), *id.* ¶ 62680; *United States v. General Cable Corp.* (S.D.N.Y., 1948), *id.* ¶ 62300; *United States v. Libbey-Owens Ford Glass Co.* (N.D. Ohio, 1948), *id.* ¶ 62323; *United States v. Technicolor, Inc.* (S.D. Calif., 1948), *id.* ¶ 62338; *United States v. Owens-Corning Fiberglass Corp.* (N.D. Ohio, 1949), *id.* ¶ 62442; *United States v. Automatic Sprinkler Co.* (N.D. Ill., 1948), *id.* ¶ 62230; *United States v. Gamewell Co.* (D. Mass., 1948), *id.* ¶ 62236; *United States v. American Optical Co.* (S.D.N.Y., 1948), *id.* ¶ 62308; *United States v. Phillips Screw Co.* (N.D. Ill., 1949), *id.* ¶ 62394; *United States v. Bendix Aviation Corp.* (S.D.N.Y., 1948), *id.* ¶ 62349.

ents acquired by USG from now to the end of time. Paragraph 6 of proposed Article VI (*infra*, p. 72) provides that at any time after five years from the judgment's effective date USG may apply to the district court to have the judgment modified so as to exclude from the obligation to license all patents which USG acquires after the date of such application.²⁹ Paragraph 6 further provides that the court shall grant the application upon a showing by USG that the effects of appellees' illegal combination have been dissipated and that competitive conditions in the gypsum board industry have been restored.

The detailed provisions of our proposed Article VI are not, we believe, seriously controversial, but we will set forth and explain the reasons for its most important provisions.

(1) It provides (par. 3) that the court shall determine what is a "reasonable" royalty if the parties fail to agree thereon. Such a provision is an inherent element of a requirement to license at a reasonable royalty. The judgment approved by this Court in the *National Lead* case contained a provision of this kind,³⁰ and the district court in the *Hartford-Empire* case, following remand to it,

²⁹ The right thus conferred is supplementary to the general right to apply for modification of the judgment granted by Article X of our proposed judgment (*infra*, p. 75).

³⁰ Paragraph 7 of the judgment in that case provided: "The Court reserves jurisdiction to pass upon the reasonableness of any royalty or charge herein directed to be reasonable." 332 U.S. 319, note 4, at p. 332.

undertook determination of the reasonable royalty if the parties could not come to an agreement.³¹

In contrast with this provision, the district court's judgment provides (Art. VI, R. 190) that the license agreement which USG is required to tender shall fix a royalty "not to exceed the royalty of the same article or process fixed in the license agreements set out in Article I' hereof," i.e., in the license agreements adjudged unlawful by Article IV of the judgment. Moreover, since Article VIII of the court's judgment (R. 190) provides that tender by USG of an agreement containing the provisions of the applicable form of agreement approved by the court shall constitute compliance by USG with the provisions of Article VI, and since each of the approved forms of agreement specifies the exact royalty to be paid (R. 166, 172, 176, 180), under the court's judgment the royalty rates fixed by the canceled license agreements are not only the maximum royalty rates payable by USG's licensees, but are the actual royalty rates payable by them. It follows that any one obtaining a patent license pursuant to the compulsory licensing provisions of the court's judgment is bound to pay the royalty rates agreed upon many years previously as an incident to price-fixing license agreements, and is precluded from showing that the doubtful validity of the licensed patent or

³¹ See *United States v. Hartford-Empire Co.*, 65 F. Supp. 271 (N.D. Ohio).

its relatively slight practical utility warrants a lower royalty rate.

(2) It provides (par. 4) that where the court has been called upon to determine the reasonable royalty, USG may ask to have an interim royalty rate fixed. This serves to protect USG in the event of substantial delay in determining the reasonable royalty.

(3) It provides (par. 2, cl. (b)) that the reasonable royalty which the licensee is to pay to USG "may not be imposed upon or measured by patent-free products, processes or uses." This provision draws support from the circumstances and conditions under which the appellees have concertedly restrained trade. USG's license agreements with its codefendants provided for payment of royalty on "all board sold, patented or unpatented, a provision which would tend to discourage the production of higher cost unpatented board" (333 U. S. at p. 385). On the prior appeal this Court said that the provision for payment of royalties on unpatented board "is strongly indicative of an agreement not to manufacture unpatented board, and the testimony of the witnesses is ample to show an understanding, if not a formal agreement that only patented board would be sold. Such an arrangement in purpose and effect increased the area of the patent monopoly and is invalid." 333 U. S. at p. 397.

Irrespective of whether or not the Court's statement as to agreement or understanding is binding upon the appellees in the present posture of the case, facts which are undisputed support the proposed bar against including unpatented products in the measure of royalty payments. Admittedly, the license agreements through which appellees controlled prices and regimented trade did provide for payment of royalties on unpatented board. It is likewise beyond dispute that, as declared by this Court, such a provision lends itself to price control over patented board. These circumstances are sufficient to warrant the prohibition under consideration, in order to guard against the danger that license provisions making sales of unpatented products a measure of the royalty will again be put to an improper use.

Automatic Radio Co. v. Hazeltine, 339 U. S. 827, 832-833, does not require a contrary conclusion. That case merely held that a provision in a patent licensing agreement that royalty be measured by the licensee's sales of certain goods, whether patented or unpatented, does not in itself create a restraint or monopoly such as to constitute a misuse of patents outside the scope of the patent grant. The case therefore did not involve any question as to the relief appropriate when violation of the anti-trust laws has been found.

(4) Proposed Article VI provides (par. 3) that, where the court is called upon to determine the

reasonable royalty, the burden of proof shall be on USG to establish the reasonableness of the royalty which it requests. We submit that this is a reasonable requirement. The facts bearing upon the value of the patented invention are known to USG but are largely unknown to applicants for licenses. There is, moreover, ample precedent for the provision under consideration. *United States v. Line Material Co.*, 333 U.S. 287, involved, like the present case, price fixing pursuant to patent licenses. After this Court reversed the district court's judgment of dismissal, the final judgment which was entered provided for compulsory licensing at a reasonable royalty and had the same provision as to burden of proof as that which we here propose.³² It also appears in some three-fourths of the recently entered Sherman Act consent decrees which provide for compulsory licensing at a reasonable royalty.³³

³² See Article V, paragraph E, of judgment in *Line Material* case, Appendix B, *infra*, p. 757. The burden-of-proof provision is also included in the judgment entered in another litigated case, *United States v. American Can Co.* (N.D. Calif., 1950), CCH Trade Reg. Serv. ¶ 62679.

³³ *United States v. American Lecithin Co.* (N.D. Ohio, 1946), CCH Trade Reg. Serv. ¶ 57542; *United States v. American Locomotive Co.* (N.D. Ind., 1947), *id.* ¶ 57621; *United States v. Electric Storage Battery Co.* (S.D.N.Y., 1947), *id.* ¶ 57645; *United States v. Standard Register Co.* (D. D.C., 1949), *id.* ¶ 62533; *United States v. Technicolor, Inc.*, *supra*, ¶ 62586; *United States v. General Cable Corp.*, *supra*; *United States v. Libbey-Owens Ford Glass Co.*, *supra*; *United States v. Technicolor, Inc.*, *supra*, ¶ 62338; *United States v. Owens-Corning Fiberglass Corp.*, *supra*; *United States v. Automatic Sprinkler Co.*, *supra*; *United States v. Gamevelli Co.*, *supra*; *United States v. White Cap Co.*, (N.D. Ill., 1948), CCH Trade

(5) The proposed article provides (par. 2, cl. (c)) that any license granted by USG pursuant to its provisions may make reasonable provision for periodic inspection of the licensee's books and records by an independent auditor or other person acceptable to the licensee, "who shall report to the licensor only the amount of the royalty due and payable." This provision for an independent audit furnishes assurance that USG will receive the full amount of royalties payable under the license. The words quoted above are contained in the judgment entered in the *National Lead and Line Material* cases³⁴ and the same provision is contained in almost all of the recent Sherman Act consent decrees which provide for compulsory licensing at a reasonable royalty.³⁵

Reg. Serv. ¶ 62268; *United States v. American Optical Co.*, supra; *United States v. Phillips Screw Co.*, supra; *United States v. Bendix Aviation Corp.*, supra, ¶ 62349.

³⁴ 332 U. S. 319, 332; Art. V, par. D, cl. (3), of the judgment, *infra*, p. 76.

³⁵ *United States v. Bendix Aviation Corp.* (D. N.J., 1946), CCH/Trade Reg. Serv. ¶ 57444; *United States v. American Air Filter Co.* (W.D. Ky., 1946), *id.* ¶ 57492; *United States v. American Lecithin Co.*, supra; *United States v. Timken Detroit Axle Co.* (E.D. Mich., 1947), *id.* ¶ 57603; *United States v. American Locomotive Co.*, supra; *United States v. Electric Storage Battery Co.*, supra; *United States v. Standard Register Co.*, supra; *United States v. Technicolor, Inc.*, supra, ¶ 62586; *United States v. General Cable Corp.*, supra; *United States v. Libbey-Owens Ford Glass Co.*, supra; *United States v. Technicolor, Inc.*, supra, ¶ 62338; *United States v. Owens-Corning Fiberglass Corp.*, supra; *United States v. Automatic Sprinkler Co.*, supra; *United States v. Gamewell Co.*, supra; *United States v. White Cap Co.*, supra; *United States v. American Optical Co.*, supra; *United States v. American Bosch Corp.* (S.D.N.Y., 1948), *id.* ¶ 62284; *United States v. Phillips Screw Co.*, supra; *United States v. Scopony Corp. of America* (S.D. N.Y., 1949), *id.* ¶ 62356; *United States v. Bendix Aviation Corp.*, supra, ¶ 62349.

The need for the limitations of our proposed clause (c) of paragraph 2 becomes apparent when consideration is given to the nature and effect of the provisions of the district court's judgment relating to USG's policing of royalty payments. The judgment provides that USG may satisfy its requirements as to licensing by entering into license agreements in the form of those "hereby approved" by the court (*supra*, p. 11). Of the forms of agreement which the court approved, the form applicable to the most important patents which USG is required to license provides that the licensee shall make monthly reports setting forth the quantity of all board manufactured by it under the licensed patents, "together with the selling price thereof" (R. 166-167). It further provides that USG may inspect the books and records of the licensees bearing upon the information required to be reported and "make copies thereof and memoranda therefrom," subject to the proviso that, upon the licensee's written request, such "examination" shall be made by a certified public accountant agreed upon between the parties (R. 167).³⁶ Under these provisions USG would have the competitive advantage of exact information as to its competitors' sales and prices. In addition, the report-

³⁶ There are comparable reporting and inspection provisions in the other approved forms of license agreement (*supra*, p. 11).

ing and inspection provisions would strongly militate against aggressive price competition or sales expansion by licensees.

(6) Paragraph 5 of proposed Article VI, which provides that the judgment shall not be construed as importing any validity or value to USG's patents or as preventing any applicant for a license from attacking the validity or scope of any such patent, is certainly unobjectionable.

III

Representatives of the Department of Justice Should Have the Right, under the Judgment, To Inspect Books and Records of the Corporate Defendants Relating to Matters Contained in the Judgment

Article VIII of our proposed judgment (*infra*, p. 73) provides that authorized representatives of the Department of Justice may, upon written request of the Attorney General or an Assistant Attorney General, examine the corporate defendants' books and records and interview their officers or employees with reference to matters contained in the judgment. It further provides that no information so obtained shall be disclosed except in proceedings by the United States to enforce the judgment or as otherwise provided by law. The article is almost identical with a paragraph of the judgment which was reviewed and affirmed in *United States v. Bausch & Lomb Co.*, 321 U. S. 707,

718, 724-728.³⁷ *Hartford-Empire Co. v. United States*, 323 U. S. 386, 433, upheld a similar paragraph of the judgment entered in that case.³⁸

In four subsequent appeals to this Court the judgments from which the respective defendants appealed contained the visitation provision embodied in our proposed Article VIII. *United States v. Pullman Co.*, 330 U. S. 806;³⁹ *United States v. National Lead Co.*, 332 U. S. 319;⁴⁰ *United States v. Paramount Pictures, Inc.*, 334 U. S. 131;⁴¹ *Standard Oil (Calif.) v. United States*, 337 U. S. 293.⁴² In two of the cases (*Pullman* and *Standard Oil*) this provision of the judgment was not assigned as error. In each of the other two cases one of the appealing defendants assigned it as error but did not press the assignment in its brief on appeal.⁴³ The final judgment entered in the *Line*

³⁷ The article does not contain a provision of the *Bausch & Lomb* judgment which this Court disapproved (p. 728), namely, that the defendants, on the Attorney General's request, shall submit reports with respect to matters contained in the judgment.

³⁸ The Court, in upholding the paragraph, directed that it be modified to accord with the Court's opinion in the *Bausch & Lomb* case. See preceding note.

³⁹ Par. 32 of judgment (Nos. 253-256, Oct. Term, 1946, Record 772).

⁴⁰ Par. 10 of judgment (333 U.S. 319, note 4, at pp. 333-334).

⁴¹ Part VI of judgment (Nos. 79-86, Oct. Term, 1947, Record 3700).

⁴² Par. XII of judgment (No. 279, Oct. Term, 1948, Record 192).

⁴³ As to *National Lead* case, see No. 91, Oct. Term, 1946, Record 346; appellants' brief 48. As to the *Paramount* case, see No. 83, Oct. Term, 1947. R. 3785; appellants' brief 9-48.

Material case following this Court's decision in 333 U. S. 287 likewise contains the visitation provision now under consideration (Appendix B, *infra*, p. 78), and the judgment entered by the district court following its decision in *United States v. American Can Co.*, 87 F. Supp. 18 (N. D. Calif.), includes this provision.⁴⁴ Furthermore, the visitation provision is found in practically all Sherman Act consent judgments which provide for compulsory licensing at a reasonable royalty. See judgments cited in notes 28, 33, 35, *supra*, pp. ⁴⁹54, 55.

It thus appears that both the courts and litigants have widely recognized that a provision of the kind here proposed reasonably serves to facilitate enforcement of a judgment which may require further action by the court in carrying out its provisions, and to prevent evasion of the obligations imposed by the judgment. Our proposed Article VIII has the support of consistent precedent and authority, and it does not infringe any substantive right of the appellees. We submit that it should be incorporated in the judgment entered in this case.

⁴⁴ CCH Trade Reg. Ser. ¶ 62,679. The defendant did not appeal from this judgment, which was entered on June 22, 1950.

There is also a visitation provision in the judgment entered by stipulation in the companion case, *United States v. Continental Can Co.*, CCH Trade Reg. Ser. ¶ 62680.

IV

The Adjudication of Defendants' Violation of the Sherman Act Should Include the Individual Defendants

The Government is not asking to have the injunctive provisions of the judgment run against the individual defendants. Under Article V of the district court's judgment (R. 189) and of the judgment we propose (*infra*, p. 68) the defendant companies and their respective officers, directors, agents, etc., are enjoined from doing certain things. The individual defendants are thereby bound as long as they remain officers or agents of the defendant companies. Under the circumstances of this case, we do not urge that the judgment restrain the action or conduct of the individual defendants *qua* individuals. Cf. *Hartford-Empire Co. v. United States*, 323 U. S. 386, 433-435.

But exclusion of the individual defendants from the adjudication of violation of the Sherman Act made in Article III of the district court's judgment (R. 189) presents a different question. Appellee Sewell L. Avery was admittedly the principal architect of the concerted price fixing and other restraints which have been adjudged illegal both by this Court and by the district court. It is therefore clear that the adjudication of violation of the Sherman Act should embrace this defendant as well as the other individual defendants who helped to formulate and carry out the unlawful scheme con-

demned by the judgment. To accomplish this result, we propose that Article III of the judgment name the "defendants" rather than the "defendant companies" as violators of the Sherman Act. We do not construe the *per curiam* order of this Court affirming Article III (339 U. S. 960) as closing the door to expansion of the coverage of this article.

Of the individual defendants named in the complaint, Bror H. Dahlberg is no longer a defendant and the adjudication which we request would not apply to him.⁴⁵ Since the Government has some doubt as to the sufficiency of the evidence as to defendant Henry J. Hartley, it will, on remand of the case to the district court, dismiss the complaint as to this defendant prior to the entry of judgment. Accordingly, the individual defendants who would be covered by our proposed Article III would be Sewell L. Avery, Oliver M. Knode, Melvin H. Baker, Frederick G. Ebsary and Frederick Tomkins. Each of them has been a party to one or more of the license agreements which were the heart of appellees' illegal combination and concert of action.⁴⁶

We believe our proposed change in Article III to be of substantial importance because the judg-

⁴⁵ The Government at the close of its evidence dismissed the complaint as to this defendant. He was not named as an appellee either in the Government's prior appeal (R. 4189) or in the present appeal (R. 196).

⁴⁶ For typical license agreements executed by one or more of the above individual defendants, see Gov. Exs. 5 (R. 4267-4276), 8 (R. 4337-4350), 9 (R. 4355-4374), 16 (R. 4495-4497).

ment, if left unchanged, would stand as a precedent for the proposition that when corporate officers have been parties to a violation of the Sherman Act, the guilt of the corporations on whose behalf the officers acted somehow insulates them from the prohibitions of the Act.

V

The Judgment Should Require Appellees To Pay the Taxable Costs of the Proceeding

The district court's judgment (Art. X) requires appellees to pay 50% of the costs of the proceeding (R. 191), whereas our proposed judgment (Art. IX) would charge the full taxable costs against them (*infra*, p. 74). The doctrine which is implicit in the district court's ruling is that a violation of the Sherman Act resulting from a mistaken view as to the law's scope is not a full-fledged violation of the statute but a special category of violation meriting lenient and preferred treatment. Our primary concern is to obtain repudiation of this spurious doctrine.⁴⁷

Rule 54(d) of the Federal Rules of Civil Procedure provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." While the court is thus not required to award costs to the prevailing party, failure to do so in the absence of solid basis there-

⁴⁷ The costs for witness fees, mileage and subsistence amount to \$2,809.50.

for constitutes a reversible abuse of discretion. In *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F. 2d 1 (C. A. 7), where the plaintiff brought a triple-damage suit based upon the defendant's alleged violation of the Robinson-Patman Act, the district court held that the plaintiff had failed to establish violation of the statute, but nevertheless taxed one-half of certain costs of the proceeding to the defendant. The court of appeals, in reversing the latter ruling, said (p. 11):

As we understand it, the denial of costs to the prevailing party or the assessment of partial costs against him is in the nature of a penalty for some defection on his part in the course of the litigation as, for example, by calling unnecessary witnesses, bringing in unnecessary issues or otherwise encumbering the record, or by delaying in raising objection fatal to the plaintiff's case. *Highway Const. Co. v. City of Miami*, 5 Cir., 126 F. 2d 777; *Royal Metal Mfg. Co. v. Art Metal Works*, 2 Cir., 130 F. 778; *Harland v. Bankers' & Merchants' Tel. Co.*, C. C., 32 F. 305; *In re Swartz*, 7 Cir., 130 F. 2d 229; *Commentary*, 5 F. R. S., 54d. 143.

It is a rare proceeding under the Sherman Act in which the defendants do not assert that they believed their conduct to be within the law. The fact, if we assume it to be a fact, that the present appellees entertained such a belief is no reason for departing from the usual rule as to taxation of costs. There has been no "defection" on the Gov-

ernment's part tending to increase the costs of the litigation. Nor are there any special equities warranting departure from the usual rule. The defendant companies (charged with payment of costs) are large and successful concerns. Presumably they have profited handsomely from their violation of the Act during a period of many years, under a system whereby the leading member of the industry "maintained rigid control of the price and terms of sale of virtually all gypsum board" (333 U. S. at p. 371).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, with directions to enter a judgment embodying the provisions of the proposed judgment set forth in the Appendix to this brief.

Respectfully submitted.

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SEPTEMBER 1950.

APPENDIX A

JUDGMENT PROPOSED TO BE ENTERED.

Article I

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a cause of action against defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Antitrust Act, and acts amendatory thereof and supplemental thereto.

Article II

For the purposes of this judgment:

1. "Defendant companies" shall mean all of the corporate defendants and Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company.

2. "Patents" shall mean United States Letters Patent and applications for United States Letters Patent relating to gypsum board, its processes, methods of manufacture, or use, and continuations in whole or in part, renewals, reissues, divisions, and extensions of any such patent or patent application.

3. "Gypsum board" shall mean plasterboard, lath, wallboard, special surfaced board, sheathing, liner board (including any such product which is perforated or metallized) made from gypsum.

4. "Gypsum products" shall mean gypsum board as defined in the preceding paragraph, and plaster, block, tile and Keene's cement made from gypsum.

5. As used in Article IV, "license agreements" shall mean the patent license agreements which were in effect between defendant United States Gypsum Company and each of the other defendant companies at the time the complaint herein was filed and described in said complaint as follows:

Agreement dated October 15, 1929, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee;

Agreement dated October 17, 1929, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee;

Agreement dated October 18, 1929, between United States Gypsum Company, as licensor, and Ebsery Gypsum Company, as licensee;

Agreement dated November 5, 1929, between United States Gypsum Company, as licensor, and Universal Gypsum and Lime Company (National Gypsum Company, as Assignee), as licensee;

Agreement dated November 25, 1929, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee;

Agreement dated April 23, 1930, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Co., as Assignee), licensee;

Agreement dated February 10, 1937, between United States Gypsum Company, as licensor,

and Texas Cement Plaster Company, as licensee;

Agreement dated October 5, 1934, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee (Metallized board);

Agreement dated October 12, 1934, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Metallized board);

Agreement dated November 2, 1934, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Metallized board);

Agreement dated December 4, 1934, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee (Metallized board);

Agreement dated August 14, 1935, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Metallized board);

Agreement dated June 8, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

Agreement dated February 2, 1937, between United States Gypsum Company, as licensor,

and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated June 23, 1937, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Perforated lath);

Agreement dated January 3, 1939, between United States Gypsum Company, as licensor, and Newark Plaster Company, as licensee (Perforated lath), and any supplement or amendment to any of said patent license agreements.

Article III

The defendants have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of Sections 1 and 2 of the Sherman Antitrust Act.

Article IV

Each of the license agreements listed in Article II hereof is adjudged unlawful under the antitrust laws of the United States and illegal, null and void.

Article V

The defendant companies, and their respective officers, directors, agents, employees, representa-

tives, and subsidiaries, be and each of them hereby is enjoined from entering into or performing any agreement or understanding to fix, maintain, stabilize, or make uniform, by patent license agreements or by other concerted action, the prices, or the terms or conditions of sale of, gypsum products sold or offered for sale or resale in or affecting interstate commerce; and from engaging in, pursuant to such an agreement or understanding, any of the following acts or practices:

1. Fixing, maintaining or making uniform the kinds, types, or varieties of gypsum products manufactured or sold; or the methods of manufacturing, selling, packaging, shipping, delivering or distributing gypsum products;

2. Refraining from the manufacture, sale or distribution of any kind, type, or variety of gypsum products or the method of manufacturing, selling, packaging, shipping, delivering or distributing gypsum products;

3. Agreeing upon or adhering to any basis for the selection or classification of purchasers of gypsum products;

4. Refraining from selling gypsum products to any purchaser or any class of purchasers;

5. Agreeing upon or adhering to any system of selling or quoting gypsum products at prices calculated or determined pursuant to a basing point delivered price system or any other plan or system which results in identical prices or price quotations at given points of sale or quotation by defendants using such plan or system;

6. Policing, investigating, checking or inquiring into the prices, quantities, terms or conditions of any offer to sell or sale of gypsum products.

Article VI

1. Defendant United States Gypsum Company is hereby ordered and directed to grant to each applicant therefor a non-exclusive license to make, use and vend under any, some or all of the patents now or hereafter owned or controlled by it; and is hereby enjoined from making any sale or other disposition of any of said patents which deprives it of the power or authority to grant such licenses, unless it requires, as a condition of such sale, transfer or assignment, that the purchaser, transferee or assignee shall observe the requirements of Articles VI and VIII of this judgment and unless the purchaser, transferee or assignee shall file with this Court, prior to consummation of said transaction, an undertaking to be bound by said articles of this judgment.

2. Defendant United States Gypsum Company is hereby enjoined from including any restriction or condition whatsoever in any license or sublicense granted by it pursuant to the provisions of this article except that (a) the license may be non-transferable; (b) a reasonable non-discriminatory royalty may be charged, which royalty may not be imposed upon or measured by patent-free products, processes or uses; (c) reasonable provisions may be made for periodic inspection of the books and records of the licensee by an independent auditor or any person acceptable to the licensee, who shall

report to the licensor only the amount of the royalty due and payable; (d) reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalty or to permit the inspection of its books and records as hereinabove provided; (e) the license must provide that the licensee may cancel the license at any time after one year from the initial date thereof by giving 30 days' notice in writing to the licensor.

3. Upon receipt of written request for a license under the provisions of this article, defendant United States Gypsum Company shall advise the applicant in writing of the royalty which it deems reasonable for the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within 60 days from the date such request for a license was received by United States Gypsum Company, the applicant therefor may forthwith apply to this Court for the determination of a reasonable royalty, and United States Gypsum Company shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General, who shall have the right to be heard thereon. In such proceeding, the burden of proof shall be on United States Gypsum Company to establish the reasonableness of the royalty requested by it, and the reasonable royalty rates, if any, determined by the Court shall apply to the applicant and all other licensees under the same patent or patents. Pending the completion of any such proceeding the applicant shall have the right to make, use and vend under the patents to which his application pertains without payment

of royalty or other compensation except as provided in paragraph 4 of this article.

4. Where an application has been made to this Court for the determination of a reasonable royalty under paragraph 3 of this article, United States Gypsum Company may apply to the Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If the Court fixes such interim royalty rate, United States Gypsum Company shall then issue and the applicant shall accept a license, or, as the case may be, a sublicense, providing for the periodic payment of royalties at such interim rate from the date of the filing of such application by the applicant. If the applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action shall be grounds for the dismissal of his application. Where an interim license or sublicense has been issued pursuant to this paragraph, reasonable royalty rates, if any, as finally determined by the Court shall be retroactive for the applicant and for all other licensees under the same patent or patents whose licenses provide for a higher royalty rate to a date to be fixed by the Court.

5. This judgment shall not be construed (a) as preventing any applicant from attacking, in this proceeding or in any other proceeding, the validity or scope of any patent of defendant United States Gypsum Company, or (b) as importing any validity or value to any such patent.

6. At any time after five years from the effective date of this judgment defendant United States Gypsum Company may apply to this Court, after

notice to the Attorney General, for an order limiting the application of paragraph 1 of this Article to patents coming under the ownership or control of the United States Gypsum Company prior to the date of such application; and the Court, upon a showing by United States Gypsum Company that the effects of defendants' combination have been dissipated and that competitive conditions in the gypsum board industry have been restored, shall grant said application and enter an order modifying paragraph 1 of Article VI of this judgment.

Article VII

Nothing contained in this judgment shall be deemed to have any effect upon the operations or activities of the defendants which are authorized or permitted by the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or the Act of Congress of August 17, 1937, commonly called the Miller-Tydings Act, or by any present or future act of Congress or amendment thereto; provided, however, nothing contained in this article shall in any manner affect the provisions of Article VI of this judgment.

Article VIII

For the purpose of securing compliance with this judgment, authorized representatives of the Department of Justice, upon written request of the Attorney General or an Assistant Attorney General to any defendant company and upon reasonable notice, shall be permitted, subject to any legally recognized privilege, access during the office hours of said defendant to all books, ledgers, ac-

counts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this judgment. Any authorized representative of the Department of Justice shall be permitted to interview officers or employees of any defendant company regarding any such matters, subject to the reasonable convenience of said defendant but without restraint or interference from it; provided, however, that such officer or employee may have counsel present. No information obtained by the means provided in this article shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this judgment or as otherwise required by law.

Article IX

Judgment is entered against the defendant companies for all costs to be taxed in this proceeding, and the costs so to be taxed are hereby prorated against the several defendant companies as follows:

United States Gypsum Company...	55%
National Gypsum Company.....	23%
Certain-teed Products Corporation	11%
The Celotex Corporation.....	3%
Ebsary Gypsum Company, Inc.....	3%
Newark Plaster Company.....	4%
Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company	1%

Article X

Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this judgment, or any other person, firm or corporation that may hereafter become bound thereby in whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of this judgment, and (2) for the enforcement of compliance therewith and the punishment of violations thereof,

APPENDIX B

PORTIONS OF FINAL JUDGMENT IN UNITED STATES
-V. LINE MATERIAL CO.

Article V

* * * \ * * *

C. Defendants Line Material Company and Southern States Equipment Corporation, their successors and assigns, are hereby ordered and directed with respect to the patents listed in said "Schedule A" and all patents on inventions made prior to March 24, 1944 pertaining to dropout fuse cutouts hereafter acquired by them, or either of them, during the life of Schultz et al. Patent Re. 22,412 and any reissue thereof, to grant to each applicant therefor a non-exclusive license to make, use, and vend dropout fuse cutouts and their parts under any, some, or all of said patents, or under any claim or claims thereof. Said defendants, their successors and assigns, are further ordered and directed with respect to all claims of Schultz

et al. Patent Re. 22,412, and with respect to all claims of Lemmon Patent No. 2,150,102, which read on a structure claimed by said Schultz et al., patent, to grant each applicant therefor a non-exclusive license to make, use, and vend under any claim or claims thereof. Each of said two defendants, its successors and assigns, are hereby enjoined and restrained from making any assignment, sale, or other disposition of any of said patents which would deprive it, or them, of the power or authority to grant such licenses, unless it is required, as a condition of such assignment, sale, or other disposition, that the purchaser, transferee, or assignee, shall observe the requirements of Articles V and VI of this judgment; and the purchaser, transferee, or assignee shall file with this Court, prior to consummation of said transaction a consent to be bound by the provisions of said Articles V and VI of this judgment.

D. Defendants Line Material Company and Southern States Equipment Corporation, their successors and assigns, are hereby enjoined and restrained from including any restriction or condition whatsoever in any license granted to others pursuant to the provisions of this Article except that: (1) the license may be non-transferable; (2) a reasonable non-discriminatory royalty may be charged; (3) reasonable provision may be made for inspection of the books and records of the licensee by an independent auditor, or any person acceptable to the licensee, who shall report to the licensor only the amount of the royalty due and payable; (4) reasonable provision may be made for cancel-

lation of the license upon failure of the licensee to pay the royalties or to permit the inspection of the books and records as hereinabove provided; (5) the license shall provide that the licensee may cancel the license at any time after one year from the initial date thereof by giving ninety (90) days' notice in writing to the licensor; (6) the license shall provide that the licensee shall immediately have the benefit of any more favorable terms granted any other licensee; and (7) such other restrictions or conditions as may be approved by the court.

E. Upon receipt of written request for a license under the provisions of this Article, the defendant receiving such request shall advise the license-applicant in writing of the royalty which it deems reasonable and will require to be paid for a license under the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within sixty (60) days from the date such request for license was received by the defendant, the license-applicant may apply forthwith to this Court for the determination of a reasonable royalty; and defendant shall, upon receipt of notice of the filing of such court application, promptly give notice thereof to the Attorney General. In any such court proceeding the burden of proof shall be on the defendant to establish the reasonableness of the royalty requested by it; and the reasonable royalty rates, if any, determined by the Court shall apply to the license-applicant, and shall also apply to all other licensees, under the same claim or claims of the patent or patents, whose licenses provide for payment of a higher

royalty rate than that determined by the Court. * * *

* * * * *

Article XI

For the purpose of securing compliance with this judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or an Assistant Attorney General, and on reasonable notice in writing at its principal office to any defendant, its successors or assigns, be permitted, subject to any legally recognized privilege: (a) access during the office hours of such defendants, its successors or assigns, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant, its successors or assigns, relating to any of the matters contained in this judgment; (b) subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters; provided, however, that information obtained by the means permitted in this Article shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States of America is a party, for the purpose of securing compliance with this judgment, or as otherwise required by law.

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MAR 14 1958

CHARLES ELMORE CROFLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1949~~ 1950

No. ~~670~~ 30

THE UNITED STATES OF AMERICA,

Appellant,

vs.

**UNITED STATES GYPSUM COMPANY, SEWELL L.
AVERY, OLIVER M. KNODE, ET AL.**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

**STATEMENT OF THE CELOTEX CORPORATION OP-
POSING JURISDICTION AND MOTION TO DISMISS
OR AFFIRM.**

ANDREW J. DALLSTREAM,

WALTER G. MOYLE,

NORMAN WAITE,

RALPH P. WANLASS,

ALBERT E. HALLETT,

Counsel for Appellees.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, ET AL.,

Defendants

**STATEMENT OF THE CELOTEX CORPORATION OP-
POSING JURISDICTION AND MOTION TO DISMISS
OR AFFIRM.**

While the above entitled cause is one which is technically reviewable by this Court on a direct appeal from the District Court, this appellee, The Celotex Corporation, asserts that the unsubstantial character of the purported questions raised by the Government's appeal is so apparent upon the face of the record as to warrant this Court's summarily disposing of the appeal at this stage of the proceedings upon a motion to dismiss or affirm under the provisions of Rules 7 and 12 of this Court.

The said appellee therefore files this its statement in opposition to the Government's statement as to jurisdiction, and includes herein its motion to dismiss the said appeal or, in the alternative, to affirm the decree of the District Court, on the ground that the supposed questions

raised by said appeal are so unsubstantial as not to require further argument.

The Factual and Procedural Basis of the Present Decree

In reversing the earlier decree of the District Court in this case (dismissing the complaint, 67 F. Supp. 397), and in remanding the case "for further proceedings in conformity with this opinion," this Court, in *United States v. United States Gypsum Co.*, 333 U. S. 364, 68 S. Ct. 525 (1948), had, *inter alia*, expressed the views that (p. 389):

" * * * industry-wide license agreements entered into with knowledge on the part of the licensor and licensees of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins; were sufficient to establish a *prima facie* case of conspiracy." (To violate the Sherman Act)

and that (p. 400):

"The General Electric case affords no cloak for the course of conduct revealed in the voluminous record in this case."

After the mandate had been filed and the case redocketed in the court below, the Government moved for the entry of a summary judgment and took the position that this Court's said decision had determined as a matter of law that a mere plurality of licenses among competitors in an entire industry, with price limitations adhered to by each of them with knowledge of the adherence of others, was, without more, a violation *per se* of the Sherman Act. Having so construed this Court's opinion, the Government took the further position that, since the defendants did not deny that they had executed the license agreements or that they had

adhered to the pricing provisions thereof with knowledge of the adherence of others, no genuine issue remained as to any fact essential to make out a violation of the Sherman Act, and that therefore all of the abuses usually constituting a violation of the Sherman Act could be laid aside and ignored and yet, on summary judgment, the Government was entitled to a decree (Tr. 7814-15). It was upon this basis, that the decree which the Government now seeks to challenge was entered.

The Questions Raised by the Government's Appeal Are Unsubstantial and Without Merit

In considering the Government's criticism not only of the decree as an entirety but of specific aspects thereof, it should be kept in mind, as this Court stated in affirming the trial court's decree in *International Salt Co. v. United States*, 332 U. S. 392, 400-401, 68 S. Ct. 12 (1947), that

"The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case. *United States v. Crescent Amusement Co.*, 323 U. S. 173, 185, 65 S. Ct. 254, 260, L. Ed. 650; *United States v. National Lead Co.*, 332 U. S. 319, 67 S. Ct. 1634."

This same thought is reflected in Mr. Justice Frankfurter's statement, in *United States v. Paramount Pictures*, 334 U. S. 131, 179, 68 S. Ct. 915 (1948), that:

"* * * it is not the function of this Court, and it would ill discharge it, to displace the district courts and write decrees *de novo*. We are, after all, an appellate tribunal even in Sherman Act cases."

Furthermore, as we have pointed out, the Government, in moving for summary judgment, took the position that a

mere plurality of licenses among competitors in an entire industry, with price limitations adhered to by each with knowledge of the adherence of others, was, without more, a violation *per se* of the Sherman Act and, laying aside all of the abuses usually constituting a violation of the Sherman Act, entitled it to a decree.

Having secured the very type of decree which it sought by moving for summary judgment, the Government is not entitled now to seek a decree based upon other controversial issues of fact or granting injunctive relief against violations not shown to have been committed here just as though the Court had actually heard the entire case and had determined such disputed issues of fact adversely to the defendants on an actual trial. Certainly an appeal by the Government from a form of decree which it itself sought and secured should not be allowed and raises no substantial question. Even the Government cannot

“Eat its cake and have it too.”

An example of a similar situation is *Associated Press v. United States*, 326 U. S. 1, 22, 65 S. Ct. 1417, where, in affirming the decree as entered by the trial court, this Court pointed out that:

“The fashioning of a decree in an anti-trust case in such a way as to prevent future violations and eradicate existing evils, is a matter which rests largely in the discretion of the Court. *United States v. Crescent Amusement Co.*, *supra*. A full exploration of facts is usually necessary in order properly to draw such a decree. In this case the government chose to present its case on the narrow issues which were within the realm of undisputed facts. In the situation thus narrowly presented, we are unable to say that the Court's decree should have gone further than it did. * * *

Again this general principle is reflected in Mr. Justice Frankfurter's statement, in *International Salt Co. v. United States*, *supra* (404-405), that:

"Having invited judgment on the bare bones of the pleadings which merely raise the validity of the tying clauses, the Government is not entitled to remedies which go beyond the justification of the pleadings. The government ought not to have it both ways."

Keeping these general principles and the factual and procedural background in mind, let us now proceed to examine such ~~decree~~ and the criticisms levelled by the Government against its scope and form.

I

The Government's Criticism of the Decree as an Entirety Is Unsubstantial and Without Merit in That the Present Decree Not Only Terminates and Dissipates the Effects of the Practices Condemned by This Court But Provides Adequate and Effective Safeguards Against Any Continuation, Revival or Renewal of Such Practices.

In contending that the questions raised in its appeal are substantial, the Government claims, *inter alia*, that:

"For all practical purposes, the decree does no more than to terminate the provisions of existing license agreements which authorize U. S. Gypsum to fix its licensees' sales prices,"

and

"patently fails to provide effective safeguards against continuation or renewal of defendants' non-competitive pricing practices."

and that therefore

"the Government has won a lawsuit and lost a cause."

We submit that, on this record, precisely the opposite is true, and that the present decree not only terminates and dissipates the effects of the practices condemned by this Court but provides adequate and effective safeguards against the continuation, revival or renewal of such practices.

The present decree, after finding (in Article III) that "the defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of sections 1 and 2 of the Sherman Anti-trust Act," adjudges (in Article IV) "Each of the license agreements * * * unlawful under the anti-trust laws of the United States and illegal, null and void."

In Article V, the present decree goes on to enjoin and restrain "each of the defendant companies and each of their respective officers, directors, agents, employees, representatives, subsidiaries, or any person acting or claiming to act under, through or for them or any of them" from:

"(1) the further performance or enforcement of any of the provisions of the Patent Licenses, including any price bulletin issued thereunder;

"(2) entering into or performing any agreement or understanding among the defendants or any of them for the purpose of or with the effect of continuing, reviving or reinstating any monopolistic practice; and,

"(3) entering into or performing any agreement or understanding among the defendants or any of them in restraint of trade and commerce in gypsum board among the several states in the eastern territory of the United States by license agreements to fix, maintain or stabilize prices of gypsum board of the terms and conditions of sale thereof."

In Article VI, the present decree also orders and directs U. S. Gypsum "to grant to each applicant therefor within 90 days after the effective date hereof, * * * a non-exclusive license to make, use and vend under any, some, or all patents and patent applications now owned or controlled by it relating to gypsum board, provided that such license agreement fixes a royalty not to exceed the royalty on the same article or process fixed in the (previous) license agreements * * *"; and enjoins and restrains U. S. Gypsum from circumventing said provisions by any transfer of its patents.

The concluding Articles (VII to X, incl.) of the decree relate to the effect of the Webb-Pomerene and Miller-Tydings Acts; approve certain forms of license agreements; retain jurisdiction to carry out and enforce the decree; and tax 50% of the costs against the defendants.

The present decree, the provisions of which are detailed above, not only terminates the existing license agreements but adequately and effectively prevents future price fixing in the gypsum board industry. Although the Government had originally charged that the defendants had employed other methods in the suppression and stabilization of other gypsum products, no determination was, nor could it have been, without a trial, made on these disputed issues, and on this record, none of the defendants' actions extended beyond the operation of the license agreements.

The present decree certainly destroys the monopoly resulting from the use of the now voided industry-wide licenses and clearly enjoins each defendant from entering into or carrying out any understanding or agreement the effect of which would be to continue, revive or renew any monopolistic practices. We cannot concur in the Government's dire views as to the purported difficulties of proof in the unlikely event that any defendant would have the au-

dacity to violate the decree. Furthermore, since price control under the patent licenses ceased in 1941, when the Hagerty starch patent expired, it seems extremely unlikely that any defendant would in the future attempt to continue, revive or renew any price fixing practices.

As this court, in *United States v. National Lead Company*, 332 U. S. 319, 67 S. Ct. 1634 (1949) at page 348, pointed out:

“Assuming, as is justified, that violation of the Sherman Act in this case has consisted primarily of the misuse of patent rights placing restraint upon interstate and foreign commerce, that conduct is not before this court for punishment. It is brought before this court in order to secure an order for its immediate discontinuance and for its future prevention. That will be accomplished largely through the strict prohibition of further performance of the provisions of the unlawful agreements. Further assurance against continued illegal restraints upon interstate and foreign commerce through the misuse of these patent rights is provided through the compulsory granting to any applicant therefor of licenses at uniform, reasonable royalties under any or all patents defined in the decree, * * *

On the record in this case, the Government certainly has not

“Won a lawsuit and lost a cause,”

and, on the contrary, as Chief Justice Stephens stated to the Government's counsel during the June 29, 1948 hearing, this was a

“victory you have now so fully won.”

It would be just as logical to contend that in *United States v. Masonite Corporation*, 316 U. S. 256, 62 S. Ct. 1070, the Government had

“Won a lawsuit and lost a cause,”

yet the decree in that case is remarkably similar in scope and form to the decree in the case at bar.

In view of these considerations, we submit that the Government's criticism of the decree as an entirety is unsubstantial and without merit in that the present decree not only terminates and dissipates the effects of the practices condemned by this Court but provides adequate and effective safeguards against any continuation, revival or renewal of such practices.

II

The Government's Criticisms of Specific Aspects of the Decree Are Likewise Unsubstantial and Without Merit in That they Do Not Demonstrate That the District Court, in Modeling Its Decree to Fit the Exigencies of This Particular Case, Abused Its Inherent Discretion, or That the Decree Is in Any Respect Defective or Inadequate.

(a) Other Media

In contending that the questions raised in its appeal are substantial, the Government claims, *inter alia*, that the injunctive provisions of paragraph (3) of said Article V of the decree

"would not apply to price fixing activities carried on through some other medium, such as a trade association, nor would they apply to concerted action to control or stabilize prices of gypsum products;"

and that, even on a motion for summary judgment, the decree

"should be so framed that it will bar further violation of the statute not only by the means found to have been employed but also by other 'untraveled roads' to the same end, . . ."

As we have already demonstrated, the present decree not only terminates and dissipates the effects of the practices condemned by this Court but provides adequate and effective safeguards against any continuation, revival or renewal of such practices.

As is indicated by Mr. Justice Frankfurter's statement in *International Salt Co. v. United States*, 332 U. S. 392, 403, 68 S. Ct. 12, this Court has repeatedly taken the position that:

"* * * when a court condemns practices as violative of the Sherman Act and the Clayton Act, it has the duty so to fashion its decree as to put an effective stop to that which is condemned. But the law also respects the wisdom of not burning even part of a house in order to roast a pig. Ordinarily, therefore, when acts are found to have been done in violation of anti-trust legislation, restraint of such acts in the future is the adequate relief. See *New York, New Haven & Hartford R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 404, 26 S. Ct. 272, 282, 50 L. Ed. 515; *Standard Oil Co. of New Jersey v. United States*, 221 U. S. 1, 77, 31 S. Ct. 502, 522, 55 L. Ed. 619, 34 L. R. A., N. S., 834, Ann. Cas. 1912 D, 734; *National Labor Relations Board v. Express Publishing Company*, 312 U. S. 426, 435-437, 61 S. Ct. 693, 699, 700, 85 L. Ed. 930. * * *"

To the same effect, see also: *Swift & Co. v. United States*, 196 U. S. 375, 25 S. Ct. 276 (1905); *United States v. National Lead Co.*, 332 U. S. 319, 348, 67 S. Ct. 1634; and *Hartford-Empire Co. v. United States*, 323 U. S. 386, 409-410, 65 S. Ct. 373.

Furthermore, as we have indicated, the Government saw fit to and did take the position, on its motion for summary judgment, that a mere plurality of licenses among competitors in an entire industry, with price limitations adhered to by each with knowledge of the adherence of others, was, without more, a violation *per se* of the Sherman Act, and

that, therefore, all of the causes usually constituting a violation of the Sherman Act could be laid aside and ignored. Under such circumstances, this Court should, as it did in *Associated Press v. United States*, 326 U. S. 1, 22, 65 S. Ct. 1417, take the position that:

"In the situation thus narrowly presented, we are unable to say that the Court's decree should have gone further than it did."

In view of these considerations, we submit that the fact that the present decree does not also specifically enjoin the defendants from pre fixing activities carried on through some other medium, such as a trade association or other concerted action, does not demonstrate that the District Court, in modeling its decree to fit the exigencies of this particular case, abused its inherent discretion, or that the decree is in that respect defective or inadequate.

(b) *The 90-Day Limitation on Licenses*

The Government also contends, *inter alia*, that:

"While the present decree provides for licensing 'any applicant', the 90-day limitation on this request makes it a practical nullity as far as any newcomer to the business is concerned."

In denying the Government's request to strike from the decree a 6-months' limitation on the right to secure patent licenses in *United States v. National Lead Company*, 332 U. S. 319, 67 S. Ct. 1634, this Court, at page 361, said:

"* * * The effective date of the decree of October 11, 1945, was stayed and suspended, by the order of Mr. Justice Reed entered January 2, 1946, pending determination of the present appeals to this Court, so that more than six months already have passed since the original date of the decree without prejudicing the

rights of the parties affected. In view of such suspension and of the new effective date to be given to the decree, pursuant to the order of this Court, there will be ample time for the exercise of this option under its terms."

Since, in the case at bar, the effective date of the present decree has likewise been stayed and suspended pending the determination of the present appeals to this Court, all persons desiring to secure such licenses will have ample time within which to do so.

Furthermore, the matter is of little, if any, importance as a matter of actual fact since most of the patents in question have already expired and there is no showing that any applicant for such a license has ever been refused.

In view of the foregoing, we submit that the fact the present decree does not require U. S. Gypsum to grant non-exclusive licenses of its gypsum board patents to those applying therefore after 90 days from the effective date of the decree, does not demonstrate that the District Court, in modeling its decree to fit the exigencies of this particular case, abused its inherent discretion, or that the decree is in that respect defective or inadequate.

(c) Royalty Rates and License Provisions

The Government also claims, *inter alia*, that:

"The decree tends to enhance U. S. Gypsum's existing dominant position in the industry. Its licensees have not previously been concerned with the validity or scope of U. S. Gypsum's patents and are thus at an obvious disadvantage in bargaining with U. S. Gypsum as to the terms of new license agreements. The decree, instead of providing for a third-party determination of disputed provisions of such agreements, permits a royalty rate as high as that under the corresponding outlawed agreement, and permits U. S. Gypsum to adopt

other provisions of the forms of agreement approved by the court."

The Government's bland assertion that the various licensees

"have not previously been concerned with the validity or scope of U. S. Gypsum's patents,"

is not correct in that the defendants' proffers of proof (admitted as true by the summary judgment motion) clearly established that such licensees and U. S. Gypsum had engaged for many years in litigation respecting the validity and scope of such patents.

There is also no evidence that any of the licenses have been or are at any disadvantage in bargaining as to the terms of new license agreements. This is particularly true at the present time since such royalties and other terms can apply only to products manufactured under now existing patents and almost all of U. S. Gypsum's important patents have already expired.

Furthermore, the other provisions of such licenses (as may be applied for) have not only not been challenged by any of such former licensees but were formulated by the District Court after protracted hearings, in which U. S. Gypsum's suggestions were often disregarded or overruled, thus obviating the Government's objection that such terms were not the result of a

"third-party determination,"

since, obviously, they were, in fact, determined by a "third-party", viz: the District Court, after an opportunity had been given all interested parties to present their divergent views with respect to the terms to be incorporated into such agreements.

In view of these considerations, we submit that the fact that the present decree permits U. S. Gypsum to charge

royalties not in excess of those charged under corresponding earlier agreements and to adopt other provisions of the forms of agreement approved by the court, does not demonstrate that the District Court, in modeling its decree to fit the exigencies of this particular case, abused its inherent discretion, or that the decree is in such respects defective or inadequate.

(d) *Royalty Reports and Inspections*

The Government also claims, *inter alia*, that, because

“The form applicable to U. S. Gypsum’s most important patents requires the licensee to report to U. S. Gypsum monthly the ‘quantity’ of gypsum board manufactured under the licensed patents and the ‘selling price’ thereof, and permits U. S. Gypsum to inspect the licensee’s records, either directly or through a certified public accountant,”

U. S. Gypsum thus

“has the competitive advantage of exact information as to its competitors’ sales and prices. In addition, the furnishing of such information would strongly militate against competitive pricing or sales expansion by any licensee, because of fear of possible reprisals by U. S. Gypsum.”

In the first place, the licensor does not have any general access to the licensee’s books and records. Under the forms of agreement approved by the District Court, the licensee is to file each calendar month with the licensor a verified statement setting forth merely the

“quantity of such gypsum board manufactured by it, and sold during the preceding calendar month, together with the selling price thereof.”

This gives U. S. Gypsum no more

“competitive advantage of exact information as to its competitor’s sales and prices,”

than if merely the total royalty due were reported, since the latter, plus a simple arithmetical computation, will produce the others.

It should also be noted that the licensee can require that any inspection of its books be made only by an independent certified public accountant, who will obviously be concerned only with the accuracy of the licensee’s report as to total royalties due.

Furthermore, the required reports as to the “quantity” sold and the “selling price” thereof relate only to gypsum board manufactured under certain U. S. Gypsum patents and, as we have pointed out previously, most of its important patents have already expired. Thus the information in question could not give U. S. Gypsum any really comprehensive information as to its competitors’ overall sales and selling prices.

As to the Government’s claim that the giving of such limited information will militate against competitive pricing or sales expansion by competitors because of the

“fear of possible reprisals by U. S. Gypsum,”

such a possibility seems rather fantastic, remote and unsubstantial. Under the main board license as approved by the District Court, U. S. Gypsum is required to furnish its competitors all data and formulae relating to the process of making a cellular product through the formation of a tenacious foam, as set forth in the claims of its patents, insofar as they apply to gypsum. The only possible “reprisal” open to U. S. Gypsum would be to manufacture and distribute its products

more efficiently so as to reduce its selling prices, which, incidentally, is the end result sought to be accomplished by the very anti-trust legislation which the Government here purports to be enforcing.

In view of the foregoing, we submit that the fact that the present decree requires licensees under certain patents to report to U. S. Gypsum monthly the "quantity" of gypsum board manufactured under such patents and the "selling price" thereof, does not demonstrate that the District Court, in modeling its decree to fit the exigencies of this particular case, abused its inherent discretion, or that the decree is in such respects defective or inadequate.

(c) Enjoining Individual Defendants, Etc.

The Government also claims, *inter alia*, that:

"Since some of the individual defendants, particularly defendant Sewell L. Avery, were the principal architects of the acts and conduct held to be illegal, the Government seems plainly entitled to an adjudication that these defendants violated the statute, and to have the injunctive provisions of the decree run against them."

With respect to an "adjudication" as to their guilt as individuals, it would be well to recall this Court's statement, in *United States v. National Lead Co.*, 332 U. S. 319, 348, 67 S. Ct. 1634, that:

"Assuming, as is justified, that violation of the Sherman Act in this case has consisted primarily in the misuse of patent rights placing restraint upon interstate and foreign commerce, that conduct is not before this Court for punishment. It is brought before this Court in order to secure an order for its immediate discontinuance and its future prevention."

With respect to the Government's contention that it is entitled to have

"The injunctive provisions of the decree run against"

the individual defendants, it should be noted that the present decree actually enjoins not only the "defendant companies" but

"each of their respective officers, directors, agents, employees, representatives, subsidiaries, and any other person acting or claiming to act under through or for them or any of them."

As this Court, in modifying certain portions of the decree in *Hartford-Empire Co. v. United States*, 323 U. S. 386, 433-435, pointed out:

"They (the individual defendants) offended against the antitrust laws by acting on behalf of, or in the name of, a corporate defendant. There are no findings, and we assume there is no evidence, that any of them have applied for, owned, dealt in, and licensed patents appertaining to the glassware art. Nor is there evidence or finding that, as individuals acting for their own account, any of them, as a principal, has entered into any of the arrangements found unlawful by the court. Despite these facts, in practically every instance where a corporate defendant is restrained from described action or conduct, these individuals, as individuals, are likewise restrained. Any injunction addressed to a corporate defendant may, as various sections of the decree do, include its officers and agents. If the individual defendants are officers or agents they will be comprehended as such by the terms of the injunction. If any of them cease to be such, no reason is apparent why he may not proceed, like other individuals, to prosecute whatever lawful business he chooses free of the restraint of an injunction. On the other hand, if new officers and directors take the places of these defendants, such new agents will automatically come under the terms of the injunction. There is no apparent necessity for including them individually in each paragraph of the decree which is applicable to the corporate defendants whose agreements and co-operation constitute

the gravamen of the complaint. "That these individuals may have rendered themselves liable to prosecution by virtue of the provisions of § 14 of the Clayton Act, is beside the point since relief in equity is remedial, not penal."

Since, as in the *Hartford-Empire* case above referred to, the individual defendants in the case at bar were not parties to, or principals in, the agreements found to be unlawful, and acted only as officers and representatives of their respective corporations, there is no need also to enjoin the individual defendants as "individuals".

In view of the foregoing considerations, we submit that the fact that the present decree does not also find each individual defendant guilty and enjoins only "the defendant companies and each of their respective officers, directors, agents, employees, representatives, subsidiaries, and any person acting or claiming to act under, through or for them, or any of them," does not demonstrate that the District Court, in modeling its decree to fit the exigencies of this particular case, abused its inherent discretion, or that the decree is in such respects defective or inadequate.

(f) *Assessment of Costs*

The Government also claims, *inter alia*, that:

"Another question of error which the appeal presents is failure to impose upon the defendants the full taxable costs of the proceeding. See *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F. 2d 1, 11 (C.A. 7). The district court appears to have been of the opinion that the defendants in good faith believed that their conduct was within rights given by the patent law and to have concluded that in the circumstances the court, insofar as it was free to exercise discretion, should enter a decree as painless to the defendants as possible. The validity of this novel theory is a question of substance which the appeal presents."

While it is quite true, as the Government states, that the District Court was of the opinion that

“the defendants in good faith believed that their conduct was within the rights given by the patent law,”

it is not true that the District Court's action, in assessing only 50% of the costs against the defendants, constituted any abuse of its inherent discretion, or presents any

“novel theory”

or

“question of substance”.

As we have already demonstrated, the trial courts are generally invested with

“large discretion to model their judgments to fit the exigencies of the particular case,”

and this is particularly true with respect to costs, especially in equity proceedings, such as this.

In affirming the decree entered by the trial court, this Court, in *Kansas City Southern Ry. Co. v. Guardian Trust Co.*, 281 U. S. 1, 9, 50 S. Ct. 195 (1930), pointed out that (even before the new Rules):

“In actions at law costs follow the result as of course, but in equity costs not otherwise governed by statute are given or withheld in the sound discretion of the court according to the facts and circumstances of the case.”

Rule 54(d) of the present Rules of Civil Procedure, in pertinent part, provides as follows:

“(d) *Costs*. Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the

prevailing party unless the court otherwise directs;
 * * * (Emphasis added).

In *Camp v. Canelacos*, 131 F. 2d 236 (1942), in affirming the judgment below, the Court of Appeals (Dis. of Col.), at page 237, said:

"Appellant contends that she should not be required to pay the compensation of a receiver who was appointed on her motion. It was for the court to allocate those costs in accordance with justice, unburdened with any fixed rule. It does not appear to have acted unjustly."

In *United States, for use, etc. v. Madsen Construction Co.*, 139 F. 2d 613 (1943), in affirming an assessment of 90% of the costs against an intervenor and 10% against the defendant where the intervenor had recovered only a portion of the amount claimed, the Court of Appeals (6th), at page 616, said:

"It fell within the discretion of the District Court to apportion the costs. Rules of Civil Procedure, 54 (d).
 * * *

In *LeSueur v. Manufacturer's Finance Co.*, 285 F. 470 (1922), cer. den. 281 U. S. 621, the Court of Appeals (6th), at page 501, said:

"We also think the full costs of the proceedings in the District Court should not be awarded to plaintiff, but that those costs should be divided, one-half to plaintiff, the other half to defendants. * * *"

In *Prudence-Bonds Corp. v. Prudence Realization Corp.*, 174 F. 2d 288 (1947), in affirming an order as to costs, the Court of Appeals (2nd), said:

"* * *. But the sole issue is one of apportionment of costs, which is a matter left to the sound discretion of the district judge. We see no abuse of discretion justifying our interference."

We see nothing in the *Chicago Sugar Co.* case, cited by the Government, which is contrary to the well-settled rule that the assessment of costs, particularly in equity cases, is a matter for the sound discretion of the trial court, and does not present a

“matter of substance.”

In view of these considerations, we submit that the fact that the present decree does not impose the full taxable costs of the proceedings against the defendants, does not demonstrate that the District Court, in modeling its decree to fit the exigencies of this particular case, abused its inherent discretion, or that the decree is in that respect defective or inadequate.

Conclusion and Motions

We therefore submit that the Government's appeal in this case presents no question of substance and that this Court would be entitled to and should dispose of the case at this stage of the proceedings without further briefs or argument.

We therefore move that the Government's said appeal be dismissed or, in the alternative, that the decree in the above entitled cause be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1949~~

1950

No. ~~100~~ 30

THE UNITED STATES OF AMERICA,

Appellant,

vs.

UNITED STATES GYPSUM COMPANY, SEWELL L.
AVERY, OLIVER M. KNODE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

STATEMENT OF UNITED STATES GYPSUM COM-
PANY, SEWELL L. AVERY AND OLIVER M. KNODE
OPPOSING JURISDICTION.

ALBERT R. CONNELLY,
CRAXSTON SPRAY,
HUGH LYNCH, JR.,
Counsel for Appellees.

Office - Supreme Court, U. S.
FILED

MAR 14 1950

CHARLES ELMORE MOSELEY
CLERK

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, ET AL.,

Defendants.

**STATEMENT BY DEFENDANTS UNITED STATES
GYPSUM COMPANY, SEWELL L. AVERY AND
OLIVER M. KNODE OF GROUNDS MAKING
AGAINST THE JURISDICTION OF THE SUPREME
COURT ASSERTED BY PLAINTIFF.**

There is no question but that the Supreme Court has jurisdiction to review, by direct appeal, a final judgment of the District Court under Section 2 of the Expediting Act of February 11, 1903, as amended. The question here is whether there is any substantial question presented by the appeal.

The Issues and the Ruling Below

It is stated that the District Court was held to have erred in its interpretation of *United States v. General Electric Co.*, 272 U.S. 476, in concluding that the Govern-

ment's evidence failed to show violation of the Sherman Act and in certain of its findings (p. 3). The Supreme Court held that the evidence at the close of the Government's case established that the industry-wide license agreements entered into with knowledge on the part of licensor and licensees of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins were sufficient to establish a *prima facie* case of conspiracy and that at this point in the case, the declarations and acts of the various members were admissible against all, as declarations or acts of co-conspirators. The holding, as we view it, was not intended as a conclusive determination of any issue in the case.

At a hearing before the trial court on June 8, 1948, it appeared that, in view of the Supreme Court's opinion, the Government was considering the question of filing a motion for summary judgment (Tr. 7765, 7773) on the ground, as then stated by plaintiff, that the Supreme Court had held that the license agreements with price limitation and adherence thereto by defendants without more constituted a violation of the Sherman Act. In this connection the trial court indicated that about the only way to arrive at a determination of the meaning of the Supreme Court's opinion was to get something before it upon which to rule and that for this purpose it would entertain a motion for summary judgment (Tr. 7788-9), in which connection it was suggested that plaintiff file its motion. Plaintiff was then granted time within which to file the motion (Tr. 7796-7), and it did file it.

Plaintiff rested its motion for summary judgment on the ground, as stated by it, that there was no genuine issue of fact in the case with respect to any material fact essential to make out a combination or conspiracy in restraint of trade or monopoly of trade or commerce under the

Sherman Act. It was argued by counsel for plaintiff that the Supreme Court had held that the license agreements with price limitation and adherence thereto by defendants constituted a violation of the Sherman Act, notwithstanding the good faith of the defendants or the assumed legality of each separate license contract; that the defendants admittedly executed the license agreements and adhered to the price provisions thereof with knowledge of the adherence of the others; and that it being sufficient to show price control under the licenses, their purpose was to clear this to the essential point in issue—which they thought was not in issue—and ask for summary judgment on that basis. Plaintiff's motion was filed under Rule 56 of the Federal Rules of Civil Procedure which specifically provides that the judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Upon that basis it was only necessary for the Government to point to the admissions of the defendants to show that there was no controversy as to any material fact. Defendants never denied the existence of the license agreements with price limitation adhered to by them, but rested their defense upon the firm belief that they had a right to do so under the doctrine of the *General Electric* case.

When the District Court (Judge Stephens dissenting) granted the motion for summary judgment on June 29, 1948, although there was no written opinion, it is clear upon the record that the motion was granted upon the theory that the Supreme Court had held that the plurality of patent licenses industry-wide with price-fixing provisions adhered to by the defendants with knowledge of the adherence of the others was *ipso facto* illegal as in violation of the Sherman Act, notwithstanding the assumed

legality of each separate patent license. Judge Garrett said that it was his opinion that if everything could be testified to which is in the proffer of proof it would bring no change in the decision of the Supreme Court on the *fundamental question involved*; that he was unable to see any loophole through which there could be a conclusion different from that reached by the Supreme Court *upon the fundamental question*. Judge Jackson said that Judge Garrett's reasoning paralleled his. (Tr. 7935-6).

Upon that theory, notwithstanding the good faith of the defendants in entering into the license agreements or adhering to the price provisions thereof or the assumed legality of each separate patent license, the District Court, in determining the fundamental question in the case, held that concert of action as aforesaid under the patent license agreements constituted a violation of the Sherman Act; that there was no controversy as to any material fact with respect thereto, since the defendants admitted the facts necessary to the determination. That was the full scope of the determination upon the motion for summary judgment.

The District Court, having determined that plaintiff was entitled to summary judgment, entered a final decree of its own making within the scope of the determination. The decree afforded full and adequate relief and gave to plaintiff the very judgment which it sought. If plaintiff's theory is correct, a thing it can not now deny on this record, there is no basis for any complaint with respect to the provisions of the decree entered by the court. Plaintiff certainly is not entitled to a decree based upon the conclusive determination of all the controversial issues of fact in favor of plaintiff's contention, the same as if the District Court had heard the defendants' evidence and ruled against them on all such issues at the close of the trial.

It was stated in plaintiff's jurisdictional statement that the Government's motion prayed for summary judgment in its favor or, in the alternative, if judgment should not be rendered on the whole case and a further trial should be necessary, that the court ascertain what material facts were without substantial controversy and those in good faith controverted, and make an order specifying such facts (p. 4). Plaintiff, although filing its motion in the alternative, as above stated, took the unalterable position that because of the admissions of the defendants with respect to the license agreements, no genuine issue of any material fact remained in the case, and that plaintiff's motion for summary judgment should accordingly be granted. Summary judgment was sought by it and granted upon that theory alone and plaintiff cannot now, before this court, say that the District Court should have proceeded to trial upon facts specified by it to be in controversy between the parties.

The Questions Are Not Substantial

Plaintiff complains that the decree of November 7, 1940, is insufficient in that it fails to provide adequate relief. Plaintiff, as shown, rested its motion for summary judgment upon the ground that there was no issue of any material fact in the case essential to make out a conspiracy in violation of the Sherman Act, based upon the admissions of defendants in the record. It may not now here assert anything to the contrary, for not only was its motion based upon the premise that there was no genuine issue of any material fact with respect to the fundamental issue in the case, but it sought and obtained final judgment on that theory. The final decree embodied everything which possibly could be granted within the determination made by the District Court upon the motion for summary judgment.

ment. It requires no citation of authority to support the legal principle that an appeal by plaintiff from a judgment which it sought and obtained on its own motion, raises no substantial question.

The decree as entered declared that the defendant companies had acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and had monopolized trade and commerce in the gypsum board industry, in violation of Sections 1 and 2 of the Sherman Antitrust Act. The license agreements were adjudged unlawful and declared to be illegal, null and void. The defendant companies, their respective officers, directors, agents, employees, representatives, subsidiaries and any person acting under or through them were enjoined and restrained from further performance or enforcement of any of the provisions of the patent licenses or the price bulletins issued thereunder, from entering into or performing any agreement or understanding for the purpose or with the effect of continuing, reviving or reinstating any monopolistic practice, and from entering into or performing any agreement or understanding in restraint of commerce in the gypsum board industry among the several states in the eastern territory thereof by license agreements to fix, maintain or stabilize prices of gypsum board or the terms and conditions of sale thereof. The defendant United States Gypsum Company was required to grant to any applicant non-exclusive licenses under the board patents upon royalties not to exceed those charged in the cancelled license agreements and containing the ordinary provisions found in non-exclusive license contracts.

Plaintiff makes no attempt to set aside the judgment as it could not for the reasons above stated, but in objecting

to the provisions of the decree merely presents a series of negative statements criticizing the decree without any showing that the trial court abused its discretion in determining the relief to be granted. When a violation of the Act has been found it is for the trial court to determine, in the exercise of its sound discretion, the relief to be afforded, and the trial court's exercise of its discretion will not be lightly disturbed. *Associated Press v. United States*, 326 U. S. 1; *United States v. National Lead Co.*, 332 U. S. 319.

Plaintiff said in its jurisdictional statement that the decree failed to provide effective safeguards against continuation or renewal of defendants' pricing practices; that the decree only terminated the existing license agreements; and that the decree tends to enhance U. S. Gypsum's position in the industry (p. 6, 7). The decree not only terminated the existing license agreements but effectively prevented any such price-fixing in the gypsum board industry. None of defendants' actions extended beyond the operation of the license agreements and although plaintiff made charges with respect to other methods of pricing and the suppression of production and stabilization of prices of other gypsum products, no determination was made with respect to these controversial issues, nor could it without the defendants having their day in court. The defendants, in operating under the patent license agreements, acted in good faith, relying upon the advice of their attorneys with respect to the holding of the Court in *United States v. General Electric Co.*, 272 U. S. 476. They did no more, as they viewed it, than was approved by the Supreme Court in the *General Electric* case, and which this Court, referring to the opinion of the District Court in sustaining the original motion of defendants to dismiss, said "stemmed logically from its understanding" of that case (333 U. S.

389). The defendants never at any time denied that they entered into the license agreements or that prices were fixed upon the patented products manufactured by them. The decree in no uncertain terms destroyed the monopoly which plaintiff charged existed by virtue of the plurality of industry-wide licenses and defendants were enjoined from entering into or performing any agreement for the purpose or with the effect of continuing, reviving or reinstating any such monopolistic practice. There could be no difficult question of proof in case of a violation of the decree, as suggested by plaintiff.

There is nothing in the record to support plaintiff's assertion that the licensees are at a disadvantage in bargaining with licensor as to the terms of new license agreements (p. 7). Not a single licensee has appealed from the decree or complained about the approved forms of license agreements, nor could they possibly have any objection to a license which gives them every right and privilege to use the patents without incurring any obligation at all unless they make patented board, at royalties not in excess of those formerly paid. The royalty provisions which were adopted by the court after a full consideration of all the facts in the case are satisfactory to the licensees and apply only to the extent that the patents are used in the manufacture of patented board.

Equally without merit is plaintiff's objection to the provisions of the licenses requiring reports of patented board sold and inspection of licensees' records to verify the correctness of royalties paid (p. 7). The license provision in this respect requires a report only of past sales and prices and the inspection of books is limited to those records showing the quantity manufactured together with the price at which sold. The licensee may require any such examination to be made by a certified public accountant of his own

choosing rather than by licensor for the sole purpose of reporting the accuracy of the royalty payments.

It is contended by plaintiff that a patentee should be required to make his patents available on reasonable terms to any one wishing to use them (p. 7), citing *Hartford-Empire Co. v. United States*, 323 U. S. 386, and *United States v. National Lead Co.*, 332 U. S. 319. The court has sustained such a decree only in those rare cases where in aid of the injunction it was required to preclude the resumption of deliberate unlawful practices because of a persistent manifestation by the defendants of a purpose to violate the Antitrust Act. In the instant case, as distinguished from the facts in the *Hartford-Empire* and *National Lead* cases, the trial court recognized that the defendants entered into the license agreements in the utmost good faith relying upon the doctrine of *United States v. General Electric Co.*, 272 U. S. 476, as it was then generally construed. There was no manifestation by the defendants in this case of a deliberate purpose to violate the Antitrust Act. Furthermore, at the date of the decree it appeared in the record that all patents in the main license agreements had expired except the three Roos bubble patents which expire in 1952 and 1954; that price control under the licenses had ceased voluntarily upon the expiration of the Haggerty starch patent in July 1941; and that there was no evidence that any board manufacturer had ever been refused a license upon request.

Complaint is made that while the present decree provides for licensing any applicant, the ninety-day limitation of this requirement makes it a practical nullity so far as any newcomer to the business is concerned (p. 7). The court's purpose in granting the right to take licenses was to protect the present licensees, all the board manufacturers in the industry, since the prior license agreements had been cancelled out in their entirety. The ninety-day provision is

ample for that purpose, as it is also with respect to any person presently contemplating the manufacture of board. Furthermore, as shown above, no application for a license by a board manufacturer has ever been denied by licensor, practically all of the patents have expired, and there is nothing in the case which would suggest even that a new-comer would have any difficulty in obtaining a license if he desired one.

It is complained that the decree failed to enjoin the individual defendants and to impose upon the defendants the full taxable costs (p. 8). Upon the motion for summary judgment, on the Government's theory, only the defendant companies were involved in adhering to the price provisions of the licenses. The decree enjoins the defendant companies and each of their respective officers, directors, agents, employees and representatives from performance of the patent licenses, including the price bulletins, and from entering into any agreement among the defendants to monopolize or restrain trade as set forth therein. The individuals were not parties to the license agreements but acted only as officers or agents of their respective companies and to treat them as such in the decree is sufficient, as was stated in the *Hartford-Empire* case, 323 U. S. 386, 428, 433. It is well established that the matter of taxing costs is one within the discretion of the trial court, and it is a matter of no substantiality in support of plaintiff's appeal. *Kansas City Southern Ry. Co. v. Guardian Trust Company*, 281 U. S. 1, 9. There is nothing in *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F. 2d 1, 11, cited by plaintiff, which conflicts with the general rule as stated.

Plaintiff refers to the alleged "novel theory" of the trial court in being influenced in the exercise of its discretion in framing a decree by the belief that the defendants acted in good faith (p. 8). The point is neither novel nor of substance. While good faith will not relieve a defendant

from the charge of violating the Sherman Act, the conduct of the defendants, their intent, and the good faith in which they acted, are always matters properly to be considered by the court in exercising its discretion in determining what must necessarily be included in a decree to effectively prevent the continuance or recurrence of the violation being enjoined. They are inherent in the oft repeated principle that the decree should be drawn to meet the exigencies of the particular case.

Plaintiff in support of its appeal further states that when summary judgment is entered against defendants in a Sherman Act proceeding the usual rule prevails that the judgment should be so framed that it will bar further violation of the statute (p. 8). The "usual rule" is that the decree in each instance must be framed in the light of the particular case before the court and should be sufficient to meet the exigencies of the case established by the record. In approving the trial court's action in *International Salt Co. v. United States*, 332 U. S. 392, this Court took pains to say that "the framing of decrees should take place in the District rather than in Appellate courts" and expressly pointed out that district courts "are invested with large discretion to model their judgments to fit the exigencies of the particular case" (332 U. S. at pages 400-1).

In an effort to support its contention of substantiality of its appeal, plaintiff contends (p. 9) that in numerous appeals in antitrust cases the adequacy or appropriateness of the relief granted by the trial court has presented an issue of more general importance than the question of substantive violation of the statute. (Citing *Crescent Amusement Co. v. United States*, 323 U. S. 173; *United States v. National Lead Company*, 332 U. S. 319, and *United States v. Paramount Pictures, Inc.*, 334 U. S. 131).

The only change which the Government obtained in the *Crescent Amusement* decree was a provision that the defend-

ants could not acquire additional theatres "except after an affirmative showing that such acquisition will not unreasonably restrain competition" in lieu of a prohibition against such acquisition unless the sale was "voluntarily" made and when none of the defendants, their officers, agents or servants were guilty of "coercing or attempting to coerce independent operators into selling out to it, or to abandon plans to compete with by it predatory practices" (323 U. S. at pp. 185-7). In *National Lead*, the Supreme Court rejected all efforts, including the Government's, to modify the decree as entered below. And in *Paramount Pictures*, although the trial court's findings on the monopoly charges were reversed and the case remanded, the principal provision of the decree rejected appeared to be the requirement that films be licensed on a competitive basis, a provision initially proposed by the Government but resisted by it in the Supreme Court (334 U. S. at pp. 161-2).

The plaintiff states that the basic issue which the appeal presents is whether the Government has won a lawsuit and lost a cause (p. 9). Certainly no one would seriously contend that in *United States v. Masonite Corporation*, 316 U. S. 265, the Government "won a lawsuit and lost a cause," and yet the terms and scope of the decree entered in the *Masonite* case are substantially the same as the decree entered herein.

It does not appear from anything stated by plaintiff that the District Court abused its discretion in entering its decree. The decree adequately covers everything which the Government sought and obtained upon its motion for summary judgment. Having thus pitched its case, plaintiff must accept the legal consequences as to the form of decree which could be properly entered upon such a determination. It may not now contend that it is entitled to a judgment founded on the theory that all of the controversial issues

have been conclusively determined against the defendants without the defendants having their day in court.

We submit there is no substantial question presented by the Government's appeal.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 30

THE UNITED STATES OF AMERICA,

Appellant,

vs.

UNITED STATES GYPSUM COMPANY, SEWELL
L. AVERY, OLIVER M. KNODE, *et al.*,

Appellees.

**BRIEF FOR APPELLEES UNITED STATES GYPSUM
COMPANY, SEWELL L. AVERY and OLIVER M. KNODE**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1950

THE UNITED STATES OF AMERICA,
Appellant.

vs.

UNITED STATES GYPSUM COMPANY,
SEWELL L. AVERY, OLIVER M.
KNODE, *et al.*,
Appellees.

No. 30

**BRIEF FOR APPELLEES UNITED STATES GYPSUM
COMPANY, SEWELL L. AVERY and OLIVER M. KNODE**

Opinions Below

The opinions of Judges Garrett and Jackson and the dissenting opinion of Judge Stephens on appellant's motion for summary judgment (R.* 102-105) have not been reported. The dissenting opinion of Judge Stephens which was filed November 7, 1949 (R. 191-194), upon the entry of the decree from which appellant has appealed, is also not reported.

The opinion of the District Court on appellees' motion to strike and its opinion on appellees' motion to dismiss the complaint under Rule 41(b) of the Federal Rules of Civil Procedure (R. 3933) are reported, respectively, in 53 F. Supp. 889 and 67 F. Supp. 397. The opinion of this Court reversing the District Court's judgment of dismissal is reported in 333 U. S. 364.

*In accordance with the procedure adopted in appellant's brief (p. 1, fn. 1), reference to the printed record on this appeal will be made by using the letter "R", and reference to the printed record on the prior appeal in this case will be made by using an italicized letter "R".

Jurisdiction

The jurisdiction of this Court was invoked by appellant under the provisions of Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended (15 U. S. C. A. § 29). Probable jurisdiction was noted by this Court on May 29, 1950 (339 U. S. 960; R. 376).

Statute Involved

The material portions of Sections 1, 2 and 4 of the Sherman Act are as follows (15 U. S. C. §§ 1, 2, 4):

“§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.

“§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209.

“§ 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective dis-

tricts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. . . . July 2, 1890, c. 647, § 4, 26 Stat. 209; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167."

Statement of the Case

This is a civil-action instituted by the United States in August, 1940, in the District Court of the United States for the District of Columbia against six corporations and seven individuals, charging them with conspiring to restrain and monopolize interstate commerce in gypsum board and gypsum products in violation of Sections 1 and 2 of the Sherman Act. An expediting certificate was filed under the Expediting Act of February 11, 1903, as amended (15 U. S. C. A. § 28), and a three-judge District Court was convened (R. 304-305, 367-368). The trial began in November, 1943, and appellant's case was closed on April 20, 1944. Thereupon, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, appellees moved to dismiss the case upon the ground that appellant had shown no right to relief.

On August 5, 1946, the District Court granted said motion and the complaint was dismissed. The appeal by the United States followed. The order dismissing the complaint was reversed by this Court on March 8, 1948 and the case remanded for further proceedings in conformity with the opinion of the Court (333 U. S. 364, 401-2). The mandate of this Court dated April 9, 1948, was issued in due course (R. 142-143).

On June 8, 1948, a conference of counsel for the several parties was held before the District Court for the purpose of determining what further proceedings should be had in the case (R. 1-28). After receiving suggestions from counsel and after hearing interpretations of this Court's opinion by counsel for the appellant and for the appellees, the District Court, in order that it might have something before it on which to rule, suggested that appellant file a motion for summary judgment (R. 22-25). It also suggested that appellees file proffer of the proof they proposed if the trial of the case should be resumed. In this connection, the court entertained the motion for summary judgment based upon the proposition of law that under the opinion of the Supreme Court on the record as made, the Government was entitled to summary judgment.

Appellant made and filed a motion for summary judgment on June 15, 1948 (R. 144). Appellees filed their proffer of proof on June 15, 1948 (R. 145). Oral argument on appellant's motion was heard by the court on June 29, 1948 (R. 29-102).

Appellant rested its motion for summary judgment on the ground, as stated by it, that there was no genuine issue of fact in the case with respect to any material fact essential to make out a combination or conspiracy in restraint of trade or monopoly under the Sherman Act. It was contended by appellant that the Supreme Court had held that the license agreements with price limitation and adherence thereto by appellees constituted a violation of the Sherman Act, notwithstanding the good faith of the appellees or the assumed legality of each separate license contract; that the appellees admittedly executed the license agreements and adhered to the price provisions thereof, with knowledge of

the adherence of the others; and that, it being sufficient to show price control under the licenses, appellant's purpose was to clear this to the essential point in issue—which it thought was not in issue—and ask for summary judgment on that basis (R. 34-35, 39-41, 44-47; see also R. 264-265).

The District Court sustained appellant's motion on the theory that if all the evidence were received on the issues in controversy and those issues were determined in favor of appellees, nevertheless as to the fundamental question in the case no evidence would alter the fact that the license agreements, industry-wide, with price limitation, adhered to by the appellees, under the decision of this Court constituted a violation of the Sherman Act notwithstanding the good faith of the appellees or the assumed legality of each separate license contract when made (R. 102-103). It entered its final decree on November 7, 1949, holding that the appellee companies had acted in concert in restraint of trade in gypsum board and had restrained and monopolized trade in the gypsum board industry. In particular, when it entered its final decree on November 7, 1949 (R. 185-191), the District Court, by Article III thereof, adjudged that:

"The defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of Sections 1 and 2 of the Sherman Antitrust Act."

This Court affirmed that adjudication. At the same time, it entered its order herein noting probable jurisdiction (339 U. S. 960) and its order dismissing the appeal of these appellees (339 U. S. 959).

Summary of Argument

I

Appellant presented its motion for summary judgment on the ground that it was entitled to judgment since there was no genuine issue of fact in the case with respect to any material fact essential to make out a combination or conspiracy in restraint of trade or monopoly under the Sherman Act. Specifically it rested its motion on the contention that under this Court's opinion a plurality of licenses containing price fixing clauses, industry-wide, with adherence to the price provisions thereof and knowledge of the adherence of others, constituted concert of action in restraint of trade, despite the assumed legality of each separate patent license. Appellant contended that for the purposes of the motion it was not essential to show other alleged abuses normally constituting a violation of the Sherman Act; that, if price control was shown, there was a case; and that it was the Government's intention to ask for summary judgment on that basis.

The District Court accepted appellant's view and granted its motion on that basis. Accordingly, in entering its judgment, the District Court quite properly did not extend the judgment beyond an adjudication that appellee companies acted in concert to fix, maintain and control prices of gypsum board and monopolize trade and commerce in the gypsum board industry, which adjudication this Court has expressly affirmed.

II

In a proceeding of the kind here involved the District Court is vested with a wide range of discretion in molding

the judgment to the exigencies of the particular case, and, where the findings of violation are sustained on appeal, the appellate court will not recast the judgment except upon a showing of abuse of discretion. The trial court's exercise of this discretion will not be lightly disturbed.

III

The District Court's decree gave appellant all the relief to which it was entitled. The admitted facts upon which judgment was entered were the industry-wide license agreements with price limitation adhered to by the parties with knowledge of the adherence of others. The decree as entered by the District Court not only invalidated and canceled the license agreements in their entirety but prohibited appellee companies, their officers and other representatives from continuing the performance or enforcement of any of the provisions of the patent licenses and of the price bulletins issued thereunder; from entering into any agreement of any kind for the purpose or with the effect of continuing, reviving or reinstating any such monopolistic practice; and from entering into any agreement or understanding by license agreements to fix, maintain or stabilize prices of gypsum board or the terms or conditions of sale thereof. Thus the decree not only effectively struck down each and every license and price bulletin thereunder which constituted the concert of action that the Court found to be illegal but also effectively prevented any similar restraint of trade in the future. In addition, the decree required appellee United States Gypsum Company to grant new licenses under the patents included in the cancelled licenses, under the conditions prescribed in the decree. The decree represented a proper exercise of discretion by the trial court. Appellant

has shown no sound reason why the trial court's exercise of its discretion in the framing of its decree should be disturbed by this Court.

IV

Appellant proposes that this Court recast the District Court's decree by substituting appellant's form of decree for that framed by the District Court. Specifically appellant urges the recasting of Article V of the decree to extend the scope of the injunctive provisions to gypsum plaster and other miscellaneous gypsum products and to matters clearly beyond the scope of the adjudication. It would extend the injunctive provisions to a territorial area which it deliberately eliminated from the case in order to be able to make its claim of price control under patent licenses throughout the entire gypsum board industry.

The provisions in portions of appellant's proposed Article V are so ambiguous as to raise great doubt as to their meaning and effect. Appellant's proposed Article V also is objectionable in undertaking to deal with controversial issues which were not adjudicated by the court and as to which appellees, by reason of the procedure adopted by appellant to obtain its judgment, have been deprived of their right to introduce their defense.

Appellant's proposals parallel the injunctive provisions which it submitted to the District Court and which were rejected by that court in the framing of its own decree. The decree as entered adequately enjoins the restraint of trade of which the appellee companies were adjudged guilty and effectively prohibits any similar restraint in the future. Appellant's proposals are unnecessary and unwarranted and the trial court's discretion in rejecting them should not be disturbed.

Appellant seeks a recasting of Article VI of the decree so as to include a stringent compulsory licensing provision under which appellee United States Gypsum Company would be compelled to grant licenses to any applicant on any one or all of its gypsum board patents now or hereafter owned, upon reasonable royalties to be determined by the District Court if the parties are unable to agree and with various restrictions as to the license provisions which would result in a license unacceptable to any patentee.

Appellant's contentions with respect to compulsory licensing were submitted to the District Court but that court concluded that such a provision was unnecessary to prevent further violations of the Act in a case like this. The court apparently found that the licensees, having acted in good faith in reliance upon *United States v. General Electric Co.*, 272 U. S. 476 (1926), should not be deprived of the opportunity for continued use of USG's patents under which they were licensed if they desired it, and gave them 90 days within which to apply for a new license. This was the underlying purpose and objective of Article VI of the District Court's decree, although it is true that the opportunity for obtaining such a license was open to any applicant. The provisions of Article VI were entirely appropriate to meet the objectives of the court in this regard.

• Compulsory licensing is a drastic remedy which has been imposed upon defendants in but a few contested cases. The only basis upon which it could properly be imposed is the necessity for so doing to prevent further continuance of the violation enjoined in the decree. It must be a necessary aid to the injunctive provisions of the decree.

The cases relied upon by appellant do not support its contentions for the inclusion of its proposed Article VI in a case like this where the summary judgment was obtained on the concert of action theory based on the plurality of licenses, and where it appeared that all the patents in the main license agreements had expired with the exception of three patents, that the price control under the licenses had ceased voluntarily years prior to the entry of the judgment, and there was no evidence that any board manufacturer had ever been refused a license by USG upon request therefor. *Hartford-Empire Co., et al. v. United States*, 323 U. S. 386 (1945) and *United States v. National Lead Co.*, 332 U. S. 319 (1947) are clearly distinguishable on the facts. Actually, the contested issue in *National Lead* was whether compulsory licensing should be on a royalty-free basis or on a reasonable royalty basis.

The various restrictions as to the license provisions incorporated in appellant's proposed Article VI are unnecessary and improper, as are the provisions which it would incorporate implying invalidity and lack of value in USG's patents, present and future.

Nothing said by appellant would warrant this Court in disturbing the exercise of the District Court's discretion with respect to the matter of compulsory licensing.

VI

The trial court did not abuse its discretion in refusing to accord visitorial rights to the Department of Justice. Such a provision is a drastic one not loosely or automatically to be made. While constitutionally it is within the power and

discretion of the trial court to accord such rights to the Department of Justice, nevertheless, if that court determined as it did here that it was not reasonably necessary in order to wipe out the illegal price fixing licenses, such determination was not an abuse of discretion. We know of no case, and the appellant cites none, where this Court has held that it was an abuse of discretion for the trial court to refuse to incorporate such a provision in the decree which it entered.

The trial court did not abuse its discretion in refusing to include the individual appellees in its adjudication of violation of the Sherman Act. Appellant concedes in this Court that under the circumstances of this case injunctive provisions against the individual appellees *qua* individuals are unnecessary. Its position that it is nevertheless entitled to an adjudication that the individual appellees violated the Act is inconsistent and untenable. The adjudication on appellant's motion could only have been as to the appellee companies, as the District Court adjudged in Article III of its decree which this Court has affirmed.

The trial court did not abuse its discretion in refusing to assess all costs against appellees. This action was taken not on the theory, as appellant asserts, that appellees were entitled to preferred treatment. The matter of taxing costs is within the discretion of the trial court and, since appellant ultimately sought and obtained its judgment on a theory, evidence in support of which could have been presented within a much narrower scope both as to content and time than was done, the trial court was not guilty of an abuse of discretion in apportioning the costs.

ARGUMENT

I

THE EXTENT OF THE DISTRICT COURT'S ADJUDICATION WAS THAT APPELLEE COMPANIES ACTED IN CONCERT TO FIX, MAINTAIN AND CONTROL PRICES OF GYPSUM BOARD AND MONOPOLIZED TRADE AND COMMERCE IN THE GYPSUM BOARD INDUSTRY.

The amended complaint herein charged that appellees violated both Sections 1 and 2 of the Sherman Act by conspiring to increase prices on patented gypsum board and unpatented gypsum products, to standardize gypsum board and its method of production for the purpose of eliminating competition, and to regulate the distribution of gypsum board by eliminating jobbers and fixing resale prices of manufacturing distributors (R. 10; 333 U. S. 364, 367). The complaint further charged (par. 46; R. 10-11) that the asserted violations of the Sherman Act had been carried out by appellees in part under the guise of numerous license agreements purporting to relate to the use of certain patents owned by United States Gypsum Company (USG), and that said license agreements were not *bona fide* patent license agreements, but were entered into by defendants for illegal purposes and to give color of legality to their activities.

The answers of appellees denied all the charges made in the complaint (R. 164-303) and appellees offered to introduce their evidence in support of their denials (R. 145-160).

Every issue was in controversy except only that appellee companies admittedly executed the license agreements

and adhered to the price provisions thereof throughout the gypsum board industry with knowledge of the adherence of the others.

Appellant, as shown, presented its motion for summary judgment on the ground that under this Court's opinion, the *General Electric* case did not authorize a patentee to issue to all competitors in an entire industry a plurality of licenses containing price fixing clauses, and that such plurality of licenses and adherence to the price provisions thereof with knowledge of the adherence of others constituted concert of action in restraint of trade, despite the assumed legality of each separate patent license, under the doctrine that lawful acts may become unlawful when taken in concert. (R. 264).

Such concert of action being the gist of the offense, counsel for appellant urged that it was only necessary to establish its existence, without any issue as to a material fact, and that all of the other abuses normally constituting a violation of the Sherman Act, such as controlling plaster prices, resale prices of manufacturing distributors, eliminating jobbers and the like, could be laid aside. In answer to the court's question, counsel said that for purposes of the motion it was not essential to show those violations; that if price control alone was shown, there was a case; and that it was the Government's intention to ask for summary judgment on that basis (R. 34-35).

In this connection, counsel stated the essential elements he had to establish, namely, whether the appellees, erstwhile competitors, had combined to fix prices and whether that is so clear that there is no genuine issue as to any material fact. He pointed out that there was no question that they were former competitors; that they all took out licenses which contained a price fixing agreement; and that

all that remained was to show concert of action by showing that at some time they learned there were other competitors in the industry all guiding themselves by USG bulletins (R. 39-41).

Finally, to establish its position, appellant asserted that it had shown: (1) that the patent license contracts admittedly were executed by the several appellees and the price bulletins issued thereunder were adhered to by them (R. 40-41), (2) that at the meeting of May 23, 1929, USG offered a license under the foam application to any of the licensees who desired it, which licenses were subsequently accepted by the licensees and signed in November, 1929 (R. 45-46), (3) that appellees admitted the formation by USG in 1932 of Board Survey to police the licenses (R. 44), (4) that it was admitted that at the meeting of October 17, 1932, appellees learned they were all operating under similar licenses and price bulletins (R. 44-45), (5) that it was admitted that all of the licenses provided for price control (R. 45-46), and (6) that counsel for appellees admitted before the Supreme Court that because of the most favored nation clause in the patent licenses each of the licensees must have known that it was participating in a general plan (R. 47).

Counsel for appellant argued from this that there was a clear cut case of the appellees, erstwhile competitors, going into a plan to license the entire industry and fix prices, each eventually knowing that the others were in the plan; that there was a combination or conspiracy under Section 1 of the Sherman Act without the necessity of showing any intent; and that the Supreme Court of the United States had so held (R. 46-47).

Appellant's position as understood and summarized (without challenge) by counsel for appellees, was as follows (R. 64):

"As I listened to Mr. Steffen this morning, it seemed to me that he has ended up, taking everything that he has said and trying to judge its total effect by the assertion that a mere plurality of licenses with price-fixing provisions, observed and adhered to, is *per se* unlawful, and, therefore, there is nothing relevant or material which the defendants could possibly offer since it is admitted that licenses were executed, that they did have price fixing provisions, that there came a time when they were industry-wide and that the licensor fixed the prices and enforced its rights in that regard as best it could, and the licensees in the main observed the prices. . . ."

Upon that basis, it was only necessary for appellant to point to the admissions of appellees to show that there was no controversy as to any material fact. Appellees never denied the existence of the license agreements with price limitation adhered to by them but rested their defense in that respect upon the firm belief that they had a right to enter into the license agreements under the doctrine of the *General Electric* case.

When the District Court granted the motion for summary judgment on June 29, 1948, although there was no written opinion, it is clear upon the record that the motion was granted upon the theory that the Supreme Court had held that the plurality of patent licenses industry-wide with price fixing provisions adhered to by appellees with knowledge of the adherence of the others was *ipso facto* illegal as in violation of the Sherman Act notwithstanding the

assumed legality of each separate patent license. Judge Garrett said that it was his opinion that if everything could be testified to which was in the proffer of proof it would bring no change in the decision of the Supreme Court on the fundamental question involved; that he was unable to see any loophole through which there could be a conclusion different from that reached by the Supreme Court upon the fundamental question. Judge Jackson said that Judge Garrett's reasoning paralleled his (R. 102-103).

Upon that theory, notwithstanding the good faith of appellee companies in entering into the license agreements or adhering to the price provisions thereof or the assumed legality of each separate patent license, the District Court, in determining the fundamental question in the case, held that concert of action as aforesaid under the patent license agreements constituted a violation of the Sherman Act; that there was no controversy as to any material fact with respect thereto since appellees admitted the facts necessary to the determination.

When it came to the entry of the decree, notwithstanding appellant's position that it was asking for summary judgment on the basis of the plurality of license theory and that the other alleged abuses could be laid aside, appellant presented a decree on the theory that every charge contained in the complaint, including all issues in controversy, had been conclusively determined against appellees (R. 250-259). Appellant's position that it was entitled to judgment on the theory that all of the controversial issues of fact had been conclusively determined against appellees is untenable.

It is clear upon the present state of the record that the only facts which have been conclusively determined in the case are those admitted by appellees, i.e., that appellee com-

panies constituted all the competitors in the gypsum board industry in the eastern area of the United States as defined in the complaint, that they executed patent license agreements, industry-wide, with price fixing provisions, and that appellee companies, all the competitors in the gypsum board industry in that area, adhered to the prices, terms and conditions of sale of patented gypsum board under the license agreements with knowledge of the adherence of the others.

The judgment having been rendered upon the pleadings and the admitted facts as aforesaid, all other facts introduced by appellant to establish its *prima facie* case were open to contradiction by appellees. This is true as to all the evidence introduced against appellees upon the trial, including the declarations of alleged co-conspirators referred to by this Court in its opinion. Appellees not only had the right to directly contradict the evidence of appellant, but the right to show the circumstances under which the declarations or quasi admissions were made, the reasons for making the same or the purpose for which made (31 C. J. S. (Evidence), §§ 270, 379, 380). Wigmore, in his work on Evidence, with particular reference to his discussion on the probative value of such quasi admissions, points out that statements, written or oral, which are not estoppels or judicial admissions are in no sense final or conclusive and have no quality of conclusiveness and upon principle cannot have; that evidence of the remainder of any such utterance may be introduced to show the full and correct significance of the evidence offered; and that evidence of quasi admissions may be explained by the other party (Wigmore on Evidence (3d Ed.), Volume IV, §§ 1048-1058, 1059). It follows that no fact in the case may be regarded as conclusively determined against appellees upon the determina-

tion of the motion for summary judgment, except those facts necessary to the determination of the motion as above shown.

The District Court, upon the entry of its final decree on November 7, 1949, defined the full scope of its determination upon the motion for summary judgment in the following language (R. 189):

“The defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of Sections 1 and 2 of the Sherman Antitrust Act.”

That judgment as shown was affirmed by this Court. The only means used by appellees to carry out the conspiracy as stated consisted of the license agreements, industry-wide, with price fixing provisions adhered to by appellees with knowledge of the adherence of the others. It follows that any decree entered in the case should be framed, as it was, within the scope of the determination as stated.

II

THE DISTRICT COURT'S EXERCISE OF DISCRETION IN FRAMING THE DECREE SHOULD NOT BE DISTURBED BY THIS COURT EXCEPT FOR A CLEAR ABUSE.

In a proceeding of the kind here involved, as stated in appellant's brief (Br. p. 23), the District Court is vested with a wide range of discretion in molding the judgment to the exigencies of the particular case, and where the findings of violation are sustained on appeal the appellate

court will not recast the judgment except upon a showing of abuse of discretion. The trial court's exercise of this discretion will not be lightly disturbed (*Associated Press et al. v. United States*, 326 U. S. 1, 22 (1945); *United States v. Crescent Amusement Co., et al.*, 323 U. S. 173, 185 (1944)). It is well recognized that because the purpose of the decree is remedial, not punitive, a court must take care that a "decree be no more drastic than the facts of the case and the law demand" (*United States v. E. I. du Pont de Nemours & Company*, 188 Fed. 127, 153 (C. C. Del. 1911)) and bear a "fair relation to the issue which was heard and determined" (*NLRB v. Swift & Co.*, 108 F. (2d) 988, 990 (C. A. 7th, 1940)); and that a court "cannot issue a general injunction against all possible breaches of the law" (*Swift and Company v. United States*, 196 U. S. 375, 396 (1905)).

The cases cited by appellant do not support its contention that here there was "an abuse of discretion calling for modification of the judgment" of the District Court (Br. p. 24).

Local 167 v. United States, 291 U. S. 293 (1934) was an extreme case, as we shall hereinafter show, in which this Court refused to disturb the trial court's discretion in entering a broad decree.

This Court, in *Ethyl Gasoline Corporation, et al. v. United States*, 309 U. S. 436 (1940) stated that the trial court was bound to frame its decree to suppress the unlawful practices and take such reasonable measures as would preclude their revival, as appellant asserts (Br. p. 26), but it is equally clear that this Court recognized that the extent of the relief was largely in the discretion of the trial court.

Appellant (Br. p. 26) cites *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897) for the

proposition that the decree should not be limited to enjoining the specific illegal agreements but should also enjoin appellees from entering into or acting under any similar agreement in the future. As we shall later show, the decree entered herein is not so limited, but affords relief adequate to the occasion.

Appellant relies on *International Salt Co., Inc. v. United States*, 332 U. S. 392 (1947) (Br. p. 26), but this Court there took pains to say that "the framing of decrees should take place in the District rather than in the Appellate courts" and expressly pointed out that district courts "are vested with large discretion to model their judgments to fit the exigencies of the particular case" (332 U. S. 392, 400-401).

In *Hartford-Empire Co. v. United States*, 323 U. S. 386, 409 (1945) this Court went on to say, immediately following the sentence quoted by appellant (Br. p. 27):

" . . . But, even so, the court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, 'in a different class than other people,' as the Government has suggested. The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt'; enjoin 'all possible breaches of the law'; or cause the defendants hereafter not 'to be under the protection of the law of the land.' . . ."

III

THE DISTRICT COURT'S DECREE GAVE APPELLANT ALL THE RELIEF TO WHICH IT WAS ENTITLED.

Appellant asserted that because of the basis upon which the District Court framed its judgment, the usual reasons

for according great weight to the trial court's conclusions respecting relief are not applicable here (Br. p. 24). The District Court, as it was required to do upon the motion for summary judgment, determined the issues which were not in controversy and sustained the motion upon those issues. Notwithstanding counsel's argument to the contrary (Br. p. 24), the record shows clearly that the court believed that the relief should be measured by the whole illegal conduct of which appellees were found guilty.

The decree as entered (R. 185-191) adjudged at the outset that the appellee companies had acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and had monopolized trade and commerce in the gypsum board industry in violation of Sections 1 and 2 of the Sherman Anti-Trust Act. The license agreements were adjudged unlawful and declared to be illegal, null and void. The appellee companies, their respective officers, directors, agents, employees, representatives, subsidiaries, and any person acting under or through them, were enjoined and restrained from further performance or enforcement of any of the provisions of the patent licenses or the price bulletins issued thereunder, from entering into or performing any agreement or understanding for the purpose or with the effect of continuing, revising or reinstating any monopolistic practice, and from entering into or performing any agreement or understanding in restraint of trade in the gypsum board industry among the several states in the eastern territory thereof by license agreements to fix, maintain or stabilize prices of gypsum board or the terms and conditions of sale thereof. Appellee United States Gypsum Company was required to grant to any applicant, within 90 days from the effective

date of the decree, non-exclusive licenses under the board patents upon royalties not to exceed those charged in the canceled license agreements and containing the ordinary provisions found in non-exclusive license contracts.

Appellant makes no attempt to set aside the adjudication, but retaining it, poses the questions whether or not the injunctive provisions of the decree should (a) prohibit appellees from acting in concert to fix prices in the gypsum board industry and from continuing pursuant to such price fixing agreements acts and practices which the appellees have used as a means for effecting price control and regimentation of trade in the gypsum board industry, (b) require appellee United States Gypsum Company to license its present and future gypsum board patents at reasonable royalty rates and upon other terms fair and reasonable to those licensed, (c) provide for visitorial powers in representatives of the Department of Justice (d) include the individual appellees, and (e) require appellees to pay all taxable costs (Br. p. 3).

The decree as entered by the District Court not only canceled the license agreements in their entirety but prohibited appellee companies from continuing the performance or enforcement of any of the provisions of the patent licenses and of the price bulletins issued thereunder, and from entering into any agreement of any kind with the effect of continuing, reviving or reinstating any such monopolistic practice, and from entering into any agreement of any kind by license agreements to fix, maintain or stabilize prices of gypsum board, or the terms and conditions of sale thereof. That certainly prohibited appellees from acting in concert to fix prices in the gypsum board industry, and from continuing, reviving, or reinstating any

price control under licenses in the gypsum board industry. The new licenses authorized by the District Court's decree (R. 164-185) were intended to and did leave the licensees in the same position they would have been if their licenses had contained no price-fixing or other objectionable provisions.

We shall show later why the adjudication of the violation should not include the individual defendants as requested by appellant, and that no visitorial powers in representatives of the Department of Justice should be included in the decree in a case like this.

Appellant seeks to recast the decree of the District Court, claiming that there is ample warrant for the recasting of the relief which it proposes (Br. p. 23). It asserts that the prohibitions of the judgment are not to be confined to the precise conduct held to have been unlawful and should embrace means used by appellees in achieving their illegal ends (Br. pp. 25-26). It is clear from an examination of the decree that the court did not merely prohibit the precise scheme used by appellees, but on the contrary sought to and did frame its decree so as to suppress the unlawful practices and preclude their revival.

It is first contended by appellant that the prohibition against further performance or enforcement of any of the provisions of the patent licenses including any patent bulletin issued thereunder is an unimportant addendum to the cancelation of appellees' existing license agreements (Br. p. 27). We do not subscribe to that statement. The provision speaks for itself.

Secondly, it is claimed that the prohibition of section (2) of Article V of the decree against entering into or performing any agreement or understanding for the purpose or

with the effect of continuing, reviving or reinstating any monopolistic practice is couched in such general terms that contempt proceedings would involve proof required to establish a substantive violation of the Sherman Act (Br. pp. 27-28). Of course, proof of an alleged violation would have to be made, but there could be no difficulty in determining whether an alleged violation was prohibited under the provision of the decree enjoining the continuation, reviving or reinstating of any monopolistic practice carried on under the license agreements. The prices, terms and conditions of sale adhered to under the licenses are not only admitted upon the record by appellees, but are contained in exhibits received in evidence in the case. The District Court, by the provision above complained of, made certain that there could be no continuation, revival or reinstatement of any price control under the licenses.

Thirdly, it is asserted that the prohibition against entering into or performing any agreement or understanding in restraint of trade and commerce in gypsum board by license agreements to fix, maintain or stabilize prices of gypsum board or the terms and conditions of sale thereof is limited to restraint of trade in the eastern United States in gypsum board which embodies an invention claimed in particular USG patents (Br. p. 28). In this connection appellant relies upon its Specification of Error No. 2 (Br. p. 16) which is the same as Assignment of Error No. 3 (R. 197), but changed to include the words "in the eastern United States". Appellant's whole case with respect to the patent licenses was premised upon the allegation that licenses industry-wide in the eastern area of the United States with price limitation adhered to by appellees constituted a violation of the Sherman Act. It selected the competitive area and de-

fixed it in its complaint (par. 20, R. 3), as the very basis of the charge that the entire gypsum board industry therein was licensed under the license agreements in question. If it were not so limited, the record would not support the charge of industry-wide price fixing.

We submit that there is no force to the contention that the court erred in confining the prohibition to the eastern area as alleged, and that no error was assigned by appellant with respect thereto.

The assertion that the provision applied only to gypsum board which embodies an invention claimed in particular USG patents, requires reference to the definitions of both "patents" and "gypsum board" in Article II of the decree to the effect that gypsum board meant plaster board or lath and wallboard made from gypsum and embodying any of the inventions or improvements set forth and claimed in any patents and applications described in the patent licenses and continuations, renewals, reissues, divisions and extensions thereof (R. 187). This in fact covered board embodying any one or more of all the inventions and improvements described in any of the patents or patent applications whether or not the patent had expired or a patent had issued upon the application. The description of the invention by reference to the license agreement was not intended to, nor did it, limit the board involved, to those unexpired patents of USG, as contended by counsel. Any question which might be entertained as to any such interpretation could easily be set at rest by eliminating the words "and embodying any of the inventions or improvements set forth and claimed in any of the patents" in the definition of gypsum board.

Not satisfied with its contentions first made with respect to the third prohibition, appellant asserted that an even more serious deficiency leaves appellees free to enter into price fixing agreements of any kind or variety provided that patent licenses are not the medium for price fixing and leaves appellees free to employ the specific practices by which they have implemented price control and trade regimentation (Br. p. 28). In this connection it was asserted that the judgment interposes no bar to the concerted adoption and enforcement of a host of rules designed to restrain price competition and stabilize prices by action similar to that condemned in *Sugar Institute, Inc. et al. v. United States*, 297 U. S. 553 (1936). That case affords no guide to the question raised here as the facts involved were quite different. The third prohibition of the District Court's decree specifically restrained any agreement or understanding by license agreements to fix, maintain or stabilize prices of gypsum board or the terms and conditions of sale thereof and the second prohibition as above shown enjoined the entering into or performance of any agreement or understanding continuing, reviving, or reinstating any monopolistic practice used in carrying out the conspiracy. The reference of counsel to a basing point system will have our attention when we come to the consideration of the provisions of appellant's suggested decree.

It is further contended by appellant that it is evident that the District Court believed that relief should be confined to the precise medium used by appellees in fixing prices and regimenting trade, namely, common acceptance of licenses containing price fixing provisions (Br. p. 29). We have shown before that this is an incorrect statement of the trial court's view. The trial court, as shown, did deter-

mine the violation and, contrary to appellant's statement, framed its decree so as to prohibit the unlawful practices or their continuation, revival or reinstatement in any form.

It is also asserted by appellant that appellees contended that price fixing through patent licenses was the single basis for summary judgment, and that the factual premises for any broader relief were put in issue by appellees' proffer of proof and must therefore be regarded as not proved for the purposes of summary judgment (Br. pp. 29-30). Our contention was that the court determined there was a violation of the Sherman Act based upon the admitted facts that the appellee companies entered into license agreements and that they adhered to the pricing and other provisions thereof and to the price bulletins issued thereunder fixing the minimum prices and terms and conditions of sale of patented gypsum board. Appellees admitted the documentary evidence consisting of the license agreements and the bulletins issued thereunder. The controversial questions in the case which were raised by the pleadings and which appellees offered to prove could afford no basis to support broader injunctive relief wholly outside the scope of the determination made by the District Court.

In appellant's statement of questions presented, its first and principal question was whether the judgment should prohibit appellees from acting in concert to fix prices in the gypsum board industry and from continuing, pursuant to such price fixing agreement, acts and practices which appellees have used as a means of effecting price control and regimentation of trade in the gypsum board industry (Br. pp. 2-3). As shown before, the District Court, upon the facts not in controversy, adjudged that the appellee companies acted in concert in restraint of trade and commerce

to fix, maintain and control the prices of gypsum-board and monopolized trade and commerce in the gypsum board industry and entered appropriate relief. It would appear that in this connection appellant is only saying that the District Court should have gone into greater detail in its decree.

It is contended that the proffer of proof does not qualify the force of appellant's original evidence because the proffer was not supported by affidavits (Br. p. 30). The proffer of proof was intended to and did inform the court of the proof which appellees expected to make upon the trial. It showed the controversial issues involved and was accepted by the court and both parties for that purpose. No objection was made to the proffer and no assignment of error was made with respect to it (R. 89-91, 96-97, 196-198).

It is further contended by appellant that once the basic price fixing conspiracy was proved, the relief to which appellant was entitled was not limited to an injunction against repetition of the precise details of the violation found (Br. p. 31). The complaint is that the judgment should bar appellees from using related or similar means for achieving the unlawful ends which the Court found and adjudged in this case, concerted fixing of prices and regulation of distribution in the gypsum industry. In this statement counsel is recurring to the contention made below that appellant is entitled to a decree upon the theory that controversial issues of fact were conclusively determined without giving appellees their day in court. The scope of the judgment in this case must be based, as it was, upon those issues of fact which were not in controversy and which, as shown, was the theory upon which appellant presented its motion and obtained summary judgment. All other issues of fact were,

as shown, laid aside by appellant as immaterial, and its acceptance of the judgment as entered forecloses any further trial of the issues which were in controversy. Upon granting the motion for summary judgment, the District Court, upon the facts not in controversy in the case, found that the appellees had acted in concert to fix, maintain and control the prices of *gypsum board* and monopolized trade and commerce in the *gypsum board industry* in violation of the Sherman Act. The finding in the decree is the only finding which could properly have been made upon the present state of the record. It gives, however, no basis for a decree to enjoin concerted fixing of prices and regulation of distribution in the *gypsum industry*, as suggested by appellant.

It is stated that through common agreements with USG, appellees have fixed gypsum board prices and terms of sale in minute detail and in pursuit of these ends they have concertedly engaged in many collateral activities (Br. p. 32). It is true that the record admittedly shows that in the gypsum board industry under the patent license agreements, the terms and conditions of sale were fixed. It is not true that in pursuit of these ends appellees concertedly engaged in many collateral activities and suppressed price competition in an entire industry, and there is no basis for such a finding upon the present state of the record.

It is further argued by appellant that if it is assumed that appellees believed that their acts were within the shelter of rights given by patent law, it is not a ground for narrow and restricted prohibitions (Br. pp. 32-33). It admits appellees are not to be penalized because of their mistaken belief, in the scope of their patent privileges, but asserts, on the other hand, that they are not entitled to

favored treatment. The District Court heard all of the evidence, all of the arguments of counsel, entertained the motion for summary judgment, and sustained the motion on the grounds above stated. That court, as the record amply shows, found that appellees in operating under the patent license agreements acted in good faith, relying upon the advice of their attorneys with respect to the holding of the court in *United States v. General Electric Company*, 272 U. S. 476 (1926) (FF 31, R. 4148); that they did no more than was approved by the Supreme Court in the *General Electric* case (FF 27, R. 4147) and which this Court, referring to the opinion of the District Court in sustaining the original motion of appellees to dismiss, said stemmed logically from its understanding of that case (333 U. S. 364, 389-390).

It is not a question of favored treatment. While good faith will not relieve a defendant from the charge of violating the Sherman Act, the conduct of the defendants, their intent, and the good faith in which they acted, are always matters properly to be considered by the court in exercising its discretion in determining what must necessarily be included in a decree to effectively prevent the continuance or recurrence of the violation being enjoined. They are inherent in the oft repeated principle that the decree should be drawn to meet the exigencies of the particular case.

The decree of the District Court in the exercise of its sound discretion under all the facts of the case sought to, and did, give full and adequate relief within the full scope of the determination made by it upon the motion for summary judgment. The decree, under these circumstances, should not be recast as counsel would have this Court do.

In *United States v. Masonite Corporation et al.*, 316 U. S. 265 (1942), the Court applied the concert of action

theory to a group of competitors operating under *del credere* agency contracts. The instant case is the companion case to *Masonite* applying the concert of action doctrine to patent licensing. The decree entered in the *Masonite* case following reversal by this Court, like the decree in this case, followed the general principle of canceling the offending contracts, with relief against further performance. New *del credere* agency contracts without the objectionable provisions were approved. For the convenience of the Court, we attach as an appendix to this brief a copy of the decree entered in the *Masonite* case.

IV

APPELLANT'S PROPOSED RECASTING OF ARTICLE V OF THE DECREE IS UNJUSTIFIED AND UNWARRANTED.

(a) *Price Fixing by Concerted Action.* Appellant states (Br. p. 34) that appellees should be expressly enjoined from fixing prices, by concert of action, as such concert of action is the epitome of appellees' offense. It is stated that the judgment should proscribe action of this kind and not merely prohibit price fixing through patent licenses—the particular instrumentality utilized to achieve that end (Br. p. 34). Of course, counsel could not mean just to enjoin against concert of action without more, but that is the way he would apply it. In this counsel refers to the opening paragraph of Article V of appellant's suggested decree (Br. pp. 68-69) wherein it proposes that appellee companies, their respective officers, etc., be, and each of them is, enjoined from entering into or performing any agreement or understanding to fix, maintain, stabilize or make uniform by patent license agreements or by other concerted action, the prices or terms or

conditions of sale of gypsum products. The language is so indefinite as to raise serious questions of construction. As the paragraph is written, a single company in its internal affairs or transactions with others could not safely conduct its lawful business. Nor could any single company enter into a patent license with price limitation, or in fact any other such arrangement, with a patentee for the production and sale of any patented gypsum product. What is meant by "concerted action" in such a provision is impossible of determination from the language used. Reference is made to the Supreme Court's injunction *pendente lite* issued on May 29, 1950, but we find nothing in that restraining order to support any such phrase as is used by appellant in the opening paragraph of said Article V.

Where the trial court has effectively enjoined appellees within the scope of the determination, there is no sound basis for recasting the decree merely because appellant desires greater relief than is necessary to meet the exigencies of the case.

(b) *Prices of Plaster and Miscellaneous Gypsum Products.* A fundamental point in appellant's suggested modification of Article V of the decree is its proposal that the injunctive provisions be extended to cover gypsum plaster, block and tile and Keene's cement, sometimes referred to as plaster and miscellaneous gypsum products. This it proposes to do by substituting the words "gypsum products" for the words "gypsum board" in Article V (Br. p. 35).

Such a contention is made notwithstanding appellant's apparent acceptance of the proposition that, in the light of the determination on its motion for summary judgment, the adjudication of restraint of trade by concerted action (Article III) should be limited to gypsum board.

As shown, the complaint herein charged appellees with conspiring to restrain trade in gypsum board, plaster and miscellaneous gypsum products (pars. 44, 45(c), *R.* 9-10). Specifically it was charged that, in addition to the agreements contained in the licenses, the parties thereto agreed among themselves to advance and stabilize the prices for plaster and miscellaneous gypsum products; and that they agreed to sell and did sell plaster and miscellaneous gypsum products on the basis of various terms and conditions of sale prescribed by USG for the sale of board (pars. 77, 103-104, *R.* 18, 27-28). Appellees' answers denied all of these charges (*R.* 284, 292) and there was no evidence whatsoever as to the prices, terms and conditions of sale at which plaster and miscellaneous gypsum products were sold or offered for sale.

The proffers of proof showed that appellees were prepared to prove that there was no agreement or understanding of any nature whatsoever with respect to the fixing or stabilizing of prices of plaster and miscellaneous gypsum products and that appellees did not by concerted action or otherwise raise, fix or stabilize such prices; that the prices for plaster and other unpatented products have at all times been highly competitive and were not in any way affected by the minimum prices established by licensor for the patented board; that the so-called rebate provisions of the price bulletins were not issued for the purpose, nor did they have the effect, of fixing or stabilizing the prices of such products; and that appellees, by complaints addressed to Board Survey or by any of its activities, did not fix or stabilize such prices (Offers of Proof Nos. 2, 52, 53, 58, 59; *R.* 145, 158, 159). Appellant's statement (*Br.* p. 36) that appellees' proffer of proof did not deny certain

comments in this Court's opinion on the prior appeal regarding plaster and Board Survey is inaccurate and unwarranted.

The trial court in its opinion, after a review of all the testimony, found not only that there was no understanding or agreement to fix prices of plaster or any unpatented gypsum product but that the price bulletin providing against indirect price-cutting on patented board by reducing the price of such products was but part of a larger provision concerning rebates and was not a device to raise, maintain or stabilize the price of plaster or miscellaneous gypsum products, nor did it have that effect. This Court, in rejecting the trial court's findings, mentioned only two items of evidence now relied upon by appellant, namely the bulletin provision and the complaints to Board Survey (333 U. S. at p. 399), from which it expressed the view that appellees had attempted to stabilize plaster prices. Certainly on the present state of the record this could only have referred to a *prima facie* showing, and it cannot be reasonably suggested that the Supreme Court thereby held that appellees would be precluded from introducing evidence to rebut the showing. It was not only a controversial issue between the parties but one which, as shown, appellant laid aside upon its motion for summary judgment and its acceptance of the judgment entered by the District Court on November 7, 1949.

It will be recalled that notwithstanding appellant's position that it was asking for summary judgment on the basis of the plurality of license theory and that the other alleged abuses could be laid aside, appellant, when it came to the entry of a decree, presented a decree which would have given it a favorable adjudication on every charge contained

in the complaint including all issues in controversy (R. 250). In this form of decree appellant had asked the court to adjudge, among other things, that appellees had contracted, combined and conspired to restrain commerce in "gypsum products" (Art. III, R. 252). The District Court refused to accept appellant's proposed decree but entered a decree of its own making wherein it was adjudged that the appellee companies had acted in concert in restraint of trade in gypsum board, which, as shown, is the adjudication this Court affirmed in its order of May 29, 1950.

Appellant originally included in its Assignment of Errors filed in this appeal (R. 196-198) the assignment that the court erred "in failing to adjudicate that the defendants have conspired to restrain interstate commerce in gypsum products" (Assignment No. 2), "in limiting the prohibitions of Article V(3) to restraints of trade "involving only gypsum board" (Assignment No. 3) and, if the court concluded that controverted questions of fact prevented entry of judgment on the whole case or for the relief requested, in not entering an order specifying the facts which it ascertained to be in dispute and directing the trial to proceed as to those facts" (Assignment No. 11).

Assignments of Error Nos. 2 and 11 have now been abandoned by appellant in its specification of errors to be urged (Br. pp. 16-18) and the portion of Assignment No. 3 referred to above has been modified to assert that the District Court erred in limiting the provisions of Article V(3) to restraints of trade "involving only 'gypsum board' in the eastern United States" (Item 2, Br. p. 16). Moreover, appellant no longer urges that Article III of the decree should adjudicate that appellees restrained trade in "gypsum products" but now limits its proposed adjudication to

gypsum board (Br. p. 68). In other words, although appellant concedes the propriety of limiting the adjudication in Article III to gypsum board, it is contending that there was an abuse of discretion warranting the recasting of the decree because the District Court did not extend the injunctive provisions to plaster and miscellaneous gypsum products as well as to board.

In *Local 167 v. United States*, 291 U. S. 293 (1934) the evidence clearly established a widespread conspiracy to restrain and monopolize commerce in live and dressed poultry throughout the metropolitan New York area. Appellants objected to a provision in the decree enjoining them from using their offices or positions in Local 167 for the purpose of coercing marketmen to buy poultry, poultry feed or other commodities necessary to the poultry business. The evidence showed that delegates of the unions coerced marketmen to use coops of a particular company which had sought to secure a monopoly of such facilities. The Court held that the lack of specific evidence that coercion had been practiced or threatened in respect of every detail or commodity was no adequate ground for striking out the clause or for limiting it to a mere specification of the coops. The Court said that having been guilty of coercion in respect of the coops in which poultry was kept and fed appellants may not complain if the injunction binds generally as to related commodities, including feed and the like. It is not surprising that this Court did not see fit to consider the trial court's injunction an abuse of discretion under the circumstances, but rather said that, regard being had to the "evidence disclosing the numerous purposes of the conspiracy and the acts of coercion customarily employed by defendants, it is plain that the clause referred to cannot be condemned as un-

necessary or without warrant" (p. 299). The facts of that case are not at all applicable to the question involved in this case.

The only other case cited by appellant in support of its contention that Article V should be recast to cover plaster and miscellaneous gypsum products is *United States v. Crescent Amusement Co. et al.*, 323 U. S. 173 (1944) (Br. p. 38). That was a case against certain motion picture exhibitors, the crux of which was the use of the buying power of the combination of exhibitors for the purpose of eliminating competition and the court found that there was ample evidence of the use of defendants' combined power for the purpose either of restricting the ability of competitors to license films or of eliminating competition by acquiring the competitors' property or otherwise. The decree enjoined the defendant exhibitors from making franchises designed to maintain their theatre monopolies and prevent independent theatres from competing with them and from entering into "any similar combinations and conspiracies for similar purposes and objects" (323 U. S. at p. 187). Appellant states that this Court sustained the injunction against entering into "any similar combinations and conspiracies having similar purposes and objects" over defendants' objection (Br. p. 38). The objection to the decree was not that it extended the relief beyond the scope of the adjudication, but rather that the injunctive provisions should be directed against distributors rather than exhibitors (323 U. S. at p. 187). Moreover, the District Court in this case has not merely prohibited the further performance of the license contracts which were found to have violated the antitrust laws, but has extended the injunctive provisions to prohibit any similar restraint of trade. The court in *Cres-*

cent Amusement Co. recognized the general rule which is here applicable, stating (p. 185):

"... We recognize however that there is a wide range of discretion in the District Court to mould the decree to the exigencies of the particular case; and where the findings of violations are sustained, we will not direct a recasting of the decree except on a showing of abuse of discretion. . . ."

The authorities amply support the action of the trial court in limiting the injunctive provisions to gypsum board. Thus, in *Swift and Company v. United States*, 196 U. S. 375 (1905), the lower court had enjoined defendants from restraining interstate commerce by the illegal practices there established, "or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid" (p. 393, fn. 1). In reviewing the appropriateness of the decree, the court held that the words of the injunction "or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid" should be stricken out, stating "We cannot issue a general injunction against all possible breaches of the law" (p. 396) and "the words quoted are a sweeping injunction to obey the law, and are open to the objection which we stated at the beginning that it was our duty to avoid" (p. 401).

In *Associated Press et al. v. United States*, 326 U. S. 1 (1945), the trial court found that certain by-laws and contractual arrangements of Associated Press were in violation of the Sherman Act and entered the injunctive relief which in its judgment was sufficient to correct the violation of the law, but declined to extend the injunctive provisions to certain by-laws and agreements which it believed to be lawful, in the absence of the restrictive membership agreements

which it had enjoined. The Government appealed and sought to have the decree broadened so as permanently to enjoin observance of the Canadian Press contract and all of the challenged by-laws. It also suggested certain specific items which should be added to the decree to assure the complete eradication of AP's discrimination against competitors of its members. In denying the Government's appeal, this Court said (p. 22):

"The fashioning of a decree in an antitrust case in such way as to prevent future violations and eradicate existing evils, is a matter which rests largely in the discretion of the court. *United States v. Crescent Amusement Co., supra*. A full exploration of facts is usually necessary in order, properly to draw such a decree. In this case the government chose to present its case on the narrow issues which were within the realm of undisputed facts. In the situation thus narrowly presented we are unable to say that the court's decree should have gone further than it did. Furthermore, the District Court retained the cause for such further proceedings as might become necessary. If, as the government apprehends, the decree in its present form should not prove adequate to prevent further discriminatory trade restraints against non-member newspapers, the court's retention of the cause will enable it to take the necessary measures to cause the decree to be fully and faithfully carried out."

The record in this case requires a similar disposition of appellant's effort to broaden the injunctive provisions of the judgment of November 9, 1949.

(c) *The Pacific Coast*. Appellant urges a recasting of the decree to extend the injunctive provisions to appellees'

operations on the Pacific Coast (Br. pp. 34-35), obviously an afterthought for the point was not specifically raised in its assignment of errors (R. 196-198) but was first mentioned in the specification of errors to be urged (Br. p. 16).

The fact of the matter is that appellant, as shown, deliberately premised its complaint upon an alleged conspiracy in restraint of trade in the eastern area of the United States as therein defined (pars. 20, 45, R. 3, 10), confined its proof to that area, and moved for summary judgment on the ground of the industry-wide licensing with price fixing, which it could only claim on that premise. Such a limitation was necessary for appellant's purpose of claiming industry-wide licensing and restraints of trade and monopolization throughout the entire gypsum board industry. There is no evidence whatsoever in the record regarding the operations of the gypsum board industry on the Pacific Coast, except that it is clear that the minimum price bulletins were expressly made inapplicable to sales of gypsum board for shipment to or delivery in that area (R. 90). There is no basis for appellant's speculations with respect to the operations of the gypsum board industry on the Pacific Coast (Br. p. 35).

This Court based its decision with respect to concert of action in an entire industry upon the fact that the licenses were industry-wide in the competitive area so selected by appellant for the purpose of its complaint. Counsel states that the situation with respect to the inclusion of the prohibition might be different if any real significance attached to the geographical scope of the trade restraints charged and found (Br. p. 35). That there is such significance appears from the complaint, the evidence, and this Court's opinion where concert of action among all the competitors

in the described area in adhering to the price provisions of the license agreements was the very foundation of the concert of action theory advanced by the Court in its opinion.

Certainly the District Court's limitation of the injunctive provisions to the scope of appellant's case was not an abuse of discretion in framing a decree to meet the exigencies of the particular case.

(d) *Resale Price Fixing.* An illustration of the wisdom of the rule that the trial court should be given broad discretion in framing its decree and that the exercise of such discretion should not be lightly disturbed in the appellate court is presented by an addition contained in appellant's draft of decree which it does not choose to mention in its brief. Thus, appellant would have the injunctive price fixing provision apply to gypsum products sold or offered for sale "or resale" (Art. V, Br. p. 69).

In its complaint in the instant case appellant charged that as part of the alleged conspiracy to restrain trade in gypsum board appellees had concertedly induced and coerced manufacturing distributors to resell, at the prices raised and fixed by appellee companies, gypsum board purchased from them (pars. 45(e), 108-11, R. 10, 29). These charges were denied in the appellees' answers (R. 275, 293), and the proffer of proof showed that the charges would be completely disproved (No. 60, R. 159). The District Court in its findings of fact entered at the time of its dismissal of the case in 1946 found that these charges were wholly unsupported by the evidence (FF 104, 116, R. 4165-4166). This Court in reversing the order of dismissal did not pass upon this question nor did it set aside these findings (333 U. S. 364, 386, 399).

Notwithstanding the record, appellant would endeavor to obtain, by the insertion of two words "or resale" in its proposed Article V, injunctive provisions which have no basis whatsoever as far as plaster and miscellaneous gypsum products are concerned and which would only be appropriate as to gypsum board if appellant had been able to establish the charge and had obtained an adjudication that appellees had illegally restrained resale prices of gypsum board, as charged in its complaint.

(e) *Enjoining Specific Practices.* Appellant urges a recasting of the decree in order to add prohibitions against specific practices it contends were used in fixing and controlling prices in the gypsum board industry (Br. pp. 38-43). The proposals parallel similar provisions which appellant submitted to the District Court and which were before that court when it framed its decree (Br. p. 15, fn. 10).

The District Court rejected appellant's suggested specification of practices and covered the point in a direct, simple and effective way by enjoining and restraining defendants from "the further performance or enforcement of any of the provisions of the Patent Licenses, including any price bulletin issued thereunder" (Art. V(1), R. 189). A brief consideration of the point will suffice to show that the District Court's method of handling the matter was entirely appropriate and that its discretion in this regard should not be disturbed merely because it did not choose to accept appellant's proposals.

As appears from appellant's brief, the effort to include the specific practices referred to in its proposed Article V(1-5) (Br. pp. 62-69) is based upon matters which allegedly were included in the license bulletins issued by the

licensor in the exercise of its reserved right to fix the minimum price at which the licensees might sell the patented board. That such details are necessary and inherent in the fixing of a price may be illustrated by reference to the license bulletins which were issued by the licensor in the *General Electric case* (R. 3987-3990) and to the pronouncements of the Bituminous Coal Authority when called upon to fix prices in the bituminous coal industry (see Federal Register, 1939, Vol. 4, pp. 2958-3126). Moreover, appellees offered to prove that all provisions of the price bulletins with respect to the terms and conditions of sale had direct relation to the prices fixed by USG and that such provisions were not promulgated for the purpose or with the effect of regimenting the industry but solely for the purpose of defining the minimum price fixed by the licensor (Offer of Proof No. 51, R. 157).

When the patent licenses and the price bulletins are stricken down and the appellee companies, their officers and representatives are enjoined from enforcing or performing any of the provisions of the licenses, including the price bulletins, appellees have been effectively restrained as we have hereinabove shown.

Referring to subparagraphs 1 and 2 of Article V of its suggested decree, appellant asserts that appellees should be enjoined from making uniform the kinds of gypsum products or the method of manufacturing, selling, packaging, shipping, delivering or distributing such products. Appellant seeks to support these provisions by referring to certain language of this Court in describing the method of pricing gypsum board (Br. pp. 40-41). As shown, the matters referred to all have to do with price and are amply covered by the prohibitions of the District Court's decree.

There are other impelling reasons why these provisions of appellant's proposed decree are objectionable and improper. They attempt to place sweeping restrictions upon every activity of the appellee companies in the manufacture, sale and distribution of gypsum board, plaster and miscellaneous gypsum products. The provisions are so vague and general that the appellee companies could not safely work under them in the ordinary conduct of their respective businesses. Furthermore, these companies serve the building industry and the methods of production and distribution of their products are largely influenced by the requirements of that industry. To illustrate, the sizes of all building materials fastened to walls of buildings normally follow standard measurements in building construction and gypsum board must follow the same pattern.

Although the provisions of appellant's proposed Article V(1) and (2) are made applicable to other gypsum products, they have reference to charges limited to gypsum board. The complaint specifically charged that appellees had restrained and monopolized the manufacture and distribution of gypsum products by concertedly standardizing gypsum board and its method of production, by limiting the manufacture of board to uniform methods and by producing only uniform kinds of board for the purpose and with the effect of eliminating competition (pars. 45(b), 77(a), 93; *R.* 10, 18-19, 25). There was no charge in the complaint of alleged efforts to standardize plaster and miscellaneous gypsum products.

The answers denied all of these charges (*R.* 284, 290) and appellees offered to substantiate their contentions by proving that there was no agreement or understanding that the production of open-edge board, No. 2 board or seconds would be discontinued, that each appellee was at all times

free to make and sell such board, and further that, the discontinuance of the manufacture of open-edge board was due entirely to economic reasons. Appellees further offered to show the reason for charging royalties on all boards for the privilege of using USG's patents and to prove that such provisions were not inserted for the purpose of eliminating the production of unpatented board nor did they have that effect (Offers of Proof Nos. 46, 54, 55; R. 156, 158).

On the prior appeal, this Court, in considering the trial court's findings of fact as to these charges, referred only to the elimination of open-edge board and was apparently largely influenced in its rejection of the findings by the royalty provision contained in the licenses (333 U. S. at pp. 396-397). But, as shown, appellees offered to prove the economic reasons for those royalty provisions and to establish that they were not included for the purpose or with the effect of eliminating the production of open-edge or any other type of board. There is nothing illegal *per se* in measuring royalties for the privilege of using licensor's patents on patent-free products.

Under the circumstances, it would obviously have been improper for the District Court to have attempted, on appellant's motion for summary judgment, to make an adjudication on its standardization charges, and it did not purport to do so. Similarly, it would be improper to include injunctive provisions which would be appropriate only if such charges had been proved. Recognizing that the questions with respect to standardization were confined to certain provisions of the license bulletins, the District Court properly took appropriate corrective measures by striking down the license bulletins and enjoining any further performance or enforcement thereof.

Referring to subparagraphs 3 and 4 of Article V of its suggested decree, appellant asserts that appellees should be enjoined from agreeing to any basis for classifying customers (Br. p. 41). This has reference to the charge that appellees eliminated jobbers.

The complaint charged appellees with concertedly refraining from distributing gypsum board, plaster, and miscellaneous gypsum products through jobbers in the eastern area (pars. 45(d), 94, 95; R. 10, 25-26). These charges were all denied in appellees' answers (R. 275, 290), and appellees offered to prove that there was no agreement or understanding among them or any of them to eliminate jobbers or to discontinue the jobber discount (Offers of Proof Nos. 56, 57; R. 158-159).

There was no evidence whatsoever as to the alleged elimination of jobbers of plaster and miscellaneous gypsum products. The trial court so found (FF 103, R. 4164), and no error was assigned to that finding on the prior appeal (R. 4178-4186).

Thus the matter has reference only to gypsum board, as to which appellant did establish that in 1930 USG issued a license bulletin eliminating the jobbers' discount on sales of patented board. This Court in its opinion on the prior appeal expressed the view that the license bulletin referred to had the effect of eliminating a class of jobbers as that term was defined in the license agreements (333 U. S. at pp. 397-398).

What has been said with respect to standardization is equally true with respect to the matter of jobbers in that the injunctive provisions against further performance or enforcement of any of the provisions of the licenses or any license bulletin issued thereunder give appellant adequate

relief and all that it is entitled to on the adjudication which has been made.

Referring to subparagraph 5 of Article V of its suggested decree, appellant would insert a specific provision with respect to agreeing upon or adhering to any system of selling or quoting gypsum products at prices calculated or determined pursuant to a basing point delivered price system or any other plan or system which results in identical prices or price quotations at given points of sale or quotation by appellees using such plan or system (Br. pp. 42, 69).

This was not a basing point case and no evidence was introduced such as should properly be before any court attempting to adjudicate as to the validity of the method of pricing being used in an industry. There was no charge in the complaint specifically directed to an alleged use of a basing point method of pricing in the gypsum board industry, the only reference to the matter being in the paragraph in which it was averred that the licensor had issued license bulletins establishing the minimum prices on gypsum board sold to dealers "f.o.b. specified basing points" (par. 91(a), R. 23). In their answer these appellees denied that the complaint properly described the provisions of the minimum price bulletins (par. 76, R. 290).

The license bulletins introduced in evidence showed that the minimum price for the patented gypsum board was established as the lowest combination of mill price and rail freight from mill to destination (R. 89). This method of pricing was one which had been prevalent in the gypsum industry for many years antedating the issuance of the first license bulletin (R. 2908-2909). It was not established by the license bulletins, but licensor, in stating the minimum price, merely used the method of pricing as it then existed.

It would be eminently unfair and improper under these circumstances to attempt in the decree to make this a basing point case by arbitrarily designating or classifying as a basing point system the method of pricing disclosed by the bulletins. The only witness at the trial who was interrogated about it said that the pricing system in the gypsum board industry was the very opposite of the basing point system; that the mill base prices were extended to all mills; and that it was really only a freight equalization method of pricing which resulted in the customer always getting the lowest possible price no matter from whom he bought (R. 2909). It would be equally unfair and improper to enjoin any method of pricing in the gypsum board industry with no evidence whatsoever of the facts necessary to an intelligent adjudication of the matter. If appellee companies are to be questioned as to their method of pricing, they should be afforded a full hearing for the presentation of all pertinent matters bearing upon their pricing practices and should not be called upon to defend themselves in a summary hearing for an alleged contempt of court.

Referring to subparagraph 6 of Article V of its suggested decree, appellant requests (Br. pp. 42-43) a prohibition against certain activities. That prohibition is clearly suggested in view of Board Survey, Inc., which was formed and used by the licensor solely to assist it in bringing about compliance with the licenses and the license bulletins and which was abandoned in 1937, three years before the complaint herein was filed (R. 2841; Offer of Proof No. 53, R. 158). Obviously, there is no occasion or justification for such a provision in the decree.

The contentions of appellant with respect to including specific injunctive provisions in the decree in this case are not supported by *Federal Trade Commission v. Cement Institute, et al.*, 333 U. S. 683 (1948) and *Sugar Institute, Inc. et al. v. United States*, 297 U. S. 553 (1936) referred to by appellant (Br. pp. 38-40). The *Cement Institute* case was decided by the Federal Trade Commission after an exhaustive trial and, upon the voluminous record presented, this Court affirmed the detailed findings of the Commission, showing restraint of trade. Appellant's comments (Br. p. 38, fn. 17) regarding the preamble preceding the specific prohibitions of the cease and desist order are irrelevant. The objection there made to the specific paragraphs had nothing to do with the question whether or not a lower tribunal had abused its discretion in framing its decree without such specificity (333 U. S. at pp. 727-728).

The *Sugar Institute* case involved charges of restraints of trade carried on through an industry trade association. After a full hearing on the evidence submitted by plaintiff and defendants, the trial court entered 218 findings of fact establishing the alleged restraints through the association activities, which findings this Court found were all amply supported by the evidence in the record. The trial court in the exercise of its discretion determined not to abolish the Institute but, rather, to permit the Institute to continue its activities subject to specific prohibitions as to the scope of its operations. The fact that there were 45 specific paragraphs in the injunctive portion of the decree, of which this Court rejected only three, is wholly immaterial to the point under consideration here.

V

APPELLANT'S PROPOSED RECASTING OF ARTICLE VI OF THE DECREE IS UNJUSTIFIED AND UNWARRANTED.

Appellant seeks (Br. pp. 43-57) a recasting of Article VI of the decree so as to compel appellee United States Gypsum Company to grant licenses to any applicant on any, some or all of its gypsum board patents now or hereafter owned, subject to the provision that after five years from the effective date of the judgment it may apply to the District Court for an order excluding from such obligation patents acquired subsequent thereto. Appellant's proposed Article VI (Br. pp. 70-73) would permit recovery of reasonable royalties, the amount thereof to be fixed by the District Court if the parties are unable to reach an agreement with respect thereto. It would also impose various restrictions as to the license provisions and would include a provision that the judgment should not be construed either as preventing any applicant for a license from attacking the validity or the scope of any patent of USG or as importing any validity or value to any such patent.

Compulsory licensing is an extreme and drastic remedy which has been imposed upon defendants in but only a few contested cases.* Never has a court imposed compulsory

*The fact that a larger number of consent decrees have provided for compulsory licensing at a reasonable royalty (Br. p. 49, fn. 28) does not afford any precedent for its imposition in the instant case, for there is no way for this Court to know the underlying facts which prompted the parties to enter into such decrees.

licensing upon a patent owner in a case like this.* The only basis upon which a court could include in a decree a provision for compulsory licensing at reasonable royalties is that it is necessary to do so to prevent further continuance of the violation enjoined in the decree. It must be a necessary aid to the injunctive provisions of the decree.

This Court has sustained such a decree where the trial court concluded that it was required to preclude the resumption of deliberate, unlawful practices because of a persistent manifestation by the defendants of a purpose to violate the anti-trust act. In other words, after a careful analysis and understanding of all the facts and circumstances in such cases, this Court has agreed that the requirement for compulsory licensing was necessary to prevent further violations of the act in aid of the injunctive provisions of the decree. It has never, to our knowledge, imposed compulsory licensing upon a patentee where such an imposition was not first found to be necessary by the trial court in the exercise of its discretion in framing the decree. Moreover, this Court has never permitted any blanket decree for compulsory licensing, but on the contrary has limited the requirement to meet the exigencies of the particular case and limited the patents to which it was applicable. It is not surprising that this Court has placed these restrictions on any such decretal provision, for to require compulsory licensing at reasonable royalties for any reason other than that stated above is but to impose penalties in the guise of preventing future violations.

*For the reasons hereinafter stated in this Point V of our brief, we do not regard Article VI of the District Court's decree as providing for compulsory licensing.

In support of its position appellant relies upon two cases: *Hartford-Empire Co., et al. v. United States*, 323 U. S. 380 (1945), and *United States v. National Lead Co., et al.*, 332 U. S. 319 (1947) (Br. p. 45). In the *Hartford-Empire* case the power of the flagrant conspiracy there found, after an extended trial and with full opportunity for the defendants to be heard, was attained by aggregating the competing patents belonging to several members of the conspiracy, placing them together in a patent pool, and vesting in one member of the conspiracy the sole right to grant licenses thereunder. It was proved, as this Court pointed out in its opinion, that in granting licenses limitations were not only made as to the area in which the licensee might operate and the quantity which might be produced under the license, but often as a result of conferences between the conspirators, licenses were refused "to prevent overstocking the glassware market and to 'stabilize' the prices at which such ware was sold" (323 U. S. at p. 398). It is understandable that in that situation it might be deemed necessary to require compulsory licensing in order to break up the monopoly that had been illegally acquired. Even so, although this Court affirmed the compulsory licensing provided for in the decree of the lower court, it saw fit to place definite limitations upon the scope of its operation (323 U. S. at pp. 418-419).

In the *National Lead* case there was also involved a cross-licensing arrangement between National Lead Company and Du Pont. Actually there was not any issue made before this Court with respect to the propriety of compulsory licensing, the issue being whether there should be compulsory licensing on a royalty-free basis or on a reasonable royalty basis, and this Court sustained the trial court's exercise of discretion in providing that reasonable royalties should be required for the use of any of the patents there

involved. In that connection this Court approved the provision in the decree that the licensor at its option could condition the grant of license to any applicant upon the requirement that the applicant grant a reciprocal license under any of its patents (332 U. S. at p. 359).

Certainly neither of these cases is authority for the proposition that this Court should disturb the exercise of the trial court's discretion in its framing of Article VI of the decree.

In this case appellant originally founded its charges upon an alleged agreement or understanding among appellees to raise and fix at arbitrary and noncompetitive levels the prices of gypsum board and plaster and other miscellaneous gypsum products, carried out in part under the guise of numerous license agreements entered into merely to give color of legality to the combination, which, as shown, appellant wholly failed to prove. The motion for summary judgment was decided upon a new theory, that adherence by appellees in an entire industry to the minimum price provisions of the patent license contracts, with knowledge of the adherence of others, violates the Sherman Act.

Moreover, there is no evidence in the case of any intent of appellees to violate the Sherman Act but on the contrary the record shows that they believed and were advised by their counsel that they had a right to enter into the patent license contracts and adhere to the price provisions therein (FF 31, R. 4148). Accordingly, the adjudication which appellant sought and obtained by its motion for summary judgment was premised on the concert of action theory arising out of the simple fact of the plurality of licenses with price limitation, and was not based upon the charges of bad faith and the use of patent licenses as a guise for covering illegal purposes which appellant originally charged.

It further appears that at the date of the decree of the District Court all the patents in the main license agreements had expired except the three Roos bubble patents which will expire in 1952 and 1954 (R. 100, 104, 109); that price control under the licenses had ceased voluntarily upon the expiration of the Haggerty starch patent (R. 64) on July 8, 1941 (FF 19, R. 4143); and that there was no evidence that any board manufacturer had ever been refused a license by USG upon request therefor.

We submit that it is obvious that the District Court was unimpressed with appellant's contention that this is the type of case in which compulsory licensing is necessary to prevent further violations of the Act in aid of the injunctive provisions of the decree. Rather, it believed that the licensees, having acted in good faith in reliance upon the *General Electric* case, should not be deprived of the opportunity to continue to use such of USG's patents, under which they were then licensed, as they might desire to use after the termination of the then outstanding licenses by order of the court. Accordingly, the District Court was seeking to find a suitable means of assuring the licensees of the continued use of such patents under forms of license that would be free from the objectionable provisions contained in the licenses which the court was canceling.

That was the underlying purpose and objective of Article VI of the decree entered by the District Court, although it is true that the opportunity for obtaining such a license was by the provisions of the decree open to any applicant, whether or not it had theretofore been a licensee of USG (R. 189).

Having in mind the determination of the District Court in this regard, it is obvious that the provisions of Article VI

of its decree were not only proper but were entirely appropriate to meet the objectives of the court.

Appellant has not presented any good reason why USG's present and future gypsum board patents should be burdened with the requirement that USG grant licenses thereunder to any applicant. Rather it states (Br. pp. 45-46) that under the circumstances it is unnecessary for the Government to contend that wherever a defendant's violation of the Sherman Act has involved misuse of patents compulsory patent licensing is a necessary element of relief. It states (Br. p. 46) that USG is the dominant factor in the industry, and proceeds to argue for a drastic compulsory licensing provision to punish appellee USG without any showing that it is necessary to prevent further continuance of the violation enjoined.

Appellant states (Br. p. 46) that by means of its patents USG has maintained rigid control over the prices and terms of sale of virtually all gypsum board but, as shown, at the time that the District Court was considering the framing of its decree, USG had not exercised its reserved right to fix the licensees' minimum price since July 8, 1941, a period of approximately eight and a half years.

Appellant states (Br. p. 46) that if the judgment allows USG freedom to license or not to license its patents, it will remain clothed with power to refuse licenses and to use the threat of costly patent litigation to exclude others from the industry, but there is nothing in the record to indicate that USG ever refused a license to any board manufacturer requesting it.

Counsel asserted that it has been USG's consistent policy to license its patents only if the licensee would accept

a license giving USG the right to fix the licensee's sales prices. This is an inaccurate statement of the fact. The fact is that at the end of protracted but successful litigation to stop infringement of its patents USG took the position that it would not grant a license to any infringer except upon terms which included payment of damages for past infringement, payment of royalties for the use of its patents and reservation by licensor of the right to fix minimum prices at which patented board might be sold. From this it is urged that compulsory licensing is required as it may not be assumed that a violator of the anti-trust laws will relinquish the fruits of his violation more completely than the court requires him to do. That a patentee has asserted the rights, which the legal profession for years understood to be inherent in the ownership of a patent under the doctrine of the *General Electric* case, furnishes no support for appellant's argument that it must therefore be assumed that the patentee will not respect the injunctive order entered herein.

Regarding appellant's statement (Br. p. 47) that neither USG nor the court below has denied the need for compulsory licensing of some sort, appellant knows that USG has consistently denied the propriety of any compulsory licensing provision in this case. As shown, the underlying purpose of Article VI in the decree of the District Court was to afford the licensees an opportunity to replace their canceled licenses with an unobjectionable form of license under the licensed patents. That was the sole reason for the inclusion of a similar provision in the form of judgment submitted by USG (R. 281-282, 358).

The compulsory licensing requirement proposed by appellant runs for all time except for the provision shifting to USG the burden of attempting to obtain relief from the provision after five years. The decree which was entered following this Court's decision in *U. S. v. Line Material Co. et al.*, 333 U. S. 287 (1948), referred to by appellant (Br. pp. 54, 75) did not require compulsory licensing under any patent issued on inventions made subsequent to March 24, 1944, a date substantially before the date of the filing of the complaint in that case. Incidentally, the provision for compulsory licensing in that case was not contested by the patentee.

Appellant urges (Br. pp. 50-54) the necessity for the provisions contained in its proposed revision of Article VI to the effect that if the parties are unable to agree upon a reasonable rate of royalty then the matter is to be referred to the court for determination. No licensee has complained or objected to the royalty rates authorized in the District Court's decree. That court having spent a vast amount of time in the trial and consideration of the case and being thoroughly familiar with the facts, saw fit to determine in advance the royalty rates which it deemed reasonable and approved those rates upon the entry of the decree, thus avoiding the time and expense of the court and parties in subsequently submitting the matter to the court.

In support of its proposed Article VI appellant dwells at length on its requirement that "royalties may not be imposed upon or measured by patent-free products, processes or uses" (Br. 52-53). Counsel does not refer to the forms of licenses approved by the District Court. These licenses do not require the licensee to pay any royalty unless it uses

the licensed patent in that they expressly provide for the payment of royalties measured only by sales of gypsum board "covered under any of the processes or embodying any of the inventions covered by said patents" (R. 166).

Appellant prefers (Br. pp. 55-56) its provision for inspection of the licensees' books to the provision contained in the licenses approved by the court. The license provision approved by the District Court contains the customary provisions calling for monthly reports from the licensee of sales of the patented board, accompanied by the royalties due, and giving the licensor or its duly authorized representative the right to inspect the books of account and records of the licensee showing the quantity of patented gypsum board manufactured and sold under the license, together with the licensee's selling price thereof (R. 166). Such records are essential to a determination of the royalties payable. The inspection clause of the approved forms of license also contains a proviso that the licensee at any time may require the examination to be made by a certified public accountant rather than by the licensor (R. 167). It is to be noted that these reports and the inspection refer to past transactions.

Nor is there any occasion for paragraph 5 of proposed Article VI (Br., p. 72). Thereby appellant seeks to constitute the court below a special forum for the hearing, at any time in the future, of any prospective licensee under any of the board patents of USG, who may find it convenient, before taking a license, to attack the validity or scope of such patent or patents. Such a provision is as objectionable as one that would permit a licensee to question the validity of a licensed patent and is entirely unneces-

sary. Obviously no one is under any compulsion to take a license from USG, or from any other patentee; and, in a proper proceeding, an alleged infringer would be entitled to attack both the validity and scope of whatever patent or patents might be in question. Besides being unnecessary, such a provision would be wholly unfair to USG in that it might very well invite irresponsible litigation.

It is not entirely clear from Article VI (5) of appellant's proposed judgment whether it be intended that a licensee of USG shall share the privilege of an applicant for a license to attack the validity of the licensed patents. If so, the provision is contrary to the holding of the decided cases that a licensee under a patent license agreement without price limitation may not challenge the validity of a licensed patent.

It would also be improper for the decree to contain, in accordance with appellant's proposal (Art. VI, (5)), a provision to the effect that the judgment shall not be construed as importing any validity to any patent of USG. Equally objectionable, if not more so, is the suggested provision that the judgment shall not be construed as importing any "value" to any patent of USG (Art. VI (5)). The judgment does not import either validity or invalidity, or value or lack of value.

VI

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ACCORD VISITORIAL RIGHTS TO THE DEPARTMENT OF JUSTICE, IN REFUSING TO INCLUDE THE INDIVIDUAL APPELLEES IN ITS ADJUDICATION OF VIOLATION OF THE SHERMAN ACT, AND IN REFUSING TO ASSESS ALL COSTS AGAINST APPELLEES.

After stating the two principal questions presented by this appeal, appellant sets forth three additional questions for this Court's consideration: (a) whether the decree should have included a provision giving representatives of the Department of Justice the right to inspect the books and records of the appellee companies relating to matters contained in the judgment and to interview their officers and employees regarding such matters; (b) whether the adjudication of violation of the Sherman Act contained in Article III of the decree should include the individual appellees as well as the appellee companies; and (c) whether the decree should assess all of the taxable costs against appellees or only 50% thereof (Br. pp. 2-3). We respectfully submit that a consideration of these three questions will show that appellant's contentions with respect to them are without merit and should be rejected by this Court.

(a) *Visitorial Powers.* Appellant urges that there was an abuse of discretion in the trial court's refusal to include in its decree appellant's proposed Article VIII giving representatives of the Department of Justice the right to inspect books and records of the corporate appellees relating to matters contained in the judgment and to interview their officers and agents (Br. pp. 57-59).

There is no question but that such a provision is a drastic one. There is nothing in the United States Code relating to monopolies and combinations in restraint of trade which makes provision for such broad visitorial powers. Without statutory authority, United States officials could not require a corporation to submit to such an examination without a search warrant. It is true that this Court in *United States v. Bausch & Lomb Optical Co., et al.*, 321 U. S. 707 (1944), concluded that inclusion of such a provision in an equity decree as against corporations was within the power and discretion of the trial court, since the Fifth Amendment does not protect a corporation against self-incrimination through compulsory production of its papers. Nevertheless this Court there clearly indicated that the inclusion of such a provision was not to be loosely or automatically made. This Court sustained the inclusion of such a provision in the decree in that case upon the legal proposition that if the trial court in the exercise of its discretion found that it was reasonably necessary to wipe out the illegal distribution system, there was no constitutional objection to the employment by equity of this method; that the circumstances of each case must control the breadth of the order; and that under the circumstances of that case this Court could not say that the inclusion of the visitorial right in the Department of Justice was beyond the discretion of the trial judge (321 U. S. at pp. 724-728). There is nothing in this case to require any such action, and the District Court so found.

What has been said with respect to the principles laid down in *Bausch & Lomb* applies equally to each of the other cases cited by appellant. The cases in which no objection was made in this Court to such a provision, or if made was

waived by the defendants, afford no precedent for appellant's contentions that the District Court's refusal to include such a provision in a case like this was an abuse of its discretion. We know of no case, and the appellant certainly cites none, where this Court has held that it was an abuse of discretion for the trial court to refuse to incorporate such a provision in the decree which it framed. As shown, provisions of consent decrees are entitled to no weight in a contested matter before this Court.

(b) *Individual Appellees.* In its Statement as to Jurisdiction filed with this Court (p. 8) appellant asserted that it was plainly entitled to an adjudication that the individual appellees violated the statute and therefore the injunctive provisions of the decree should run against them. Appellant now concedes that the District Court gave proper and adequate relief in directing the injunctive provisions of the decree against the appellee companies, their respective officers, directors, agents, etc., and concedes that "under the circumstances of this case" injunctive provisions against the individual appellees would be unnecessary (Br. p. 60). Nevertheless, appellant persists in its contention that it is entitled to an adjudication that the individual appellees violated the Act. Its position is inconsistent and untenable.

Upon the motion for summary judgment based upon the admitted facts as to the industry-wide licenses with price limitation, concert of action was found only with respect to the companies and not the individuals. Appellant contended that it was entitled to such a judgment although the legality of each separate license contract be assumed upon the present state of the record. Appellant failed to estab-

lish a conspiracy to enter into the patent license contracts as charged in the complaint, and there is no evidence in the record of any deliberate intention of the individual appellees to violate the law.

In a case like this it could only be proper, upon the granting of a motion for summary judgment, to adjudicate that the appellee companies had acted in concert in restraint of trade in gypsum board in violation of the Sherman Act, as the District Court did in Article III of its decree, which Article this Court expressly affirmed at the time of noting probable jurisdiction.

In support of its contention for an adjudication against the individual appellees, appellant advances the inaccurate statement (Br. p. 61) that "each of them has been a party to one or more of the license agreements . . .". The facts are that none of the individual appellees was a party to any of the license agreements but simply that each of them as an officer of one of the appellee companies executed one or more of such agreements on behalf of his company.

Appellant makes the wholly unwarranted statement that appellee Sewell L. Avery "was admittedly the principal architect of the concerted price fixing and other restraints which have been adjudged illegal". Every charge in the complaint against any individual appellee was sharply controverted by the pleadings and by the appellees' offer of proof. They were not determined upon the granting of appellant's motion which was premised, as shown, upon admitted facts and upon the assumed legality of each separate license contract. Furthermore, by the procedure which appellant chose to obtain its judgment, Mr. Avery was deprived of the opportunity of testifying in the exercise of

his constitutional right to be heard before there could be any adjudication as to any charge against him individually.

Recognizing that it is completely protected by having the injunctive provisions of the decree run against the appellee companies and their respective representatives, appellant seeks an adjudication against the individual appellees because, it asserts, the decree of the court below, if not changed, will stand as a precedent for the proposition that corporate officers may be insulated from the provisions of the Sherman Act by the "guilt" of their corporate principals (Br. pp. 61-62). But the decree entered by the District Court does not afford any such precedent. There is not any evidence in the record and no finding by the court below that any of the individual appellees intended to violate the law, or that any of them performed any acts with respect to the subject matter of this action except as an officer of one of the appellee companies. It is the appellant who is here seeking to create a dangerous precedent, not the appellees, by asking this Court to hold that when a corporation is found to have violated the law, the judgment may include its officers, individually, although they have not had an opportunity to be heard in their own defense.

(c) *Taxable Costs.* Appellant urges as error the action of the District Court in assessing against the appellee companies 50% of the costs of the proceeding instead of the full taxable costs (Br. pp. 62-64). In this connection it asserts that it is implicit in the District Court's ruling that a violation of the Sherman Act resulting from a mistaken view as to the law's scope is not a full-fledged violation of the statute but a special category of violation meriting lenient and preferred treatment.

It is well established that the matter of taxing costs is one within the discretion of the trial court. *Kansas City Southern Ry. Co. v. Guardian Trust Company, et al.*, 281 U. S. 1, 9 (1930). There is nothing in Rule 54(d) of the Federal Rules of Civil Procedure or *Chicago Sugar Company v. American Sugar Refining Company*, 176 F. (2d) 1, 11 cited by appellant (Br. pp. 62-63) which conflicts with the general rule as stated.

This case was tried by appellant upon the theory that appellees had entered into a plan or agreement to fix prices or otherwise restrain commerce in gypsum products in part by the use of license contracts which were not *bona fide* but entered into simply to give color of legality to the alleged combination. In this appellant failed to establish its case. It now relies upon a theory of law violation based upon concerted action arising out of the plurality of industry-wide license agreements with price fixing which theory was not foreseen either by the appellees and their counsel or the appellant and its counsel. There is a serious question whether it is even alleged in the complaint. Upon the theory which appellant adopted on its motion for summary judgment, no evidence was necessary to sustain its motion except those facts which appellees never even denied. Appellant's case could have been submitted to the court for judgment upon the introduction in evidence of the license agreements and the bulletins issued thereunder.

It was undoubtedly the realization of these facts, as well as the failure to show actual or deliberate intent on the part of any of the appellees to violate the law, which prompted the District Court to assess 50% of the taxable costs against appellees. Under the circumstances clearly it was not an abuse of discretion.

CONCLUSION

For the foregoing reasons the judgment of the District Court should not be disturbed.

Respectfully submitted,

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CRANSTON SPRAY,
ALBERT R. CONNELLY,
HUGH LYNCH, JR.,
Of Counsel

October 11, 1950

APPENDIX

IN THE
United States District Court
FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

Plaintiff,

against

MASONITE CORPORATION, THE CELOTEX CORPORATION, CERTAIN-TEED PRODUCTS CORPORATION, ~~JOHNS-MANVILLE~~ SALES CORPORATION, INSULITE COMPANY, FLINTKOTE COMPANY, NATIONAL GYPSUM COMPANY, WOOD CONVERSION COMPANY, ARMSTRONG CORK COMPANY and DANT & RUSSELL, INC.,

Defendants.

Civil Action
No. 7-498

FINAL JUDGMENT.

This cause came on to be further heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

I. That the Court has jurisdiction of the subject matter hereof and all of the parties hereto, and that the final judgment entered September 27, 1941, in this cause, whereby the complaint herein was dismissed on the merits, be and hereby is vacated and set aside.

II. That the defendants, Masonite Corporation, Celotex Corporation, Certain-teed Products Corporation, Johns-

Manville Sales Corporation, Insulite Company, Flintkote Company, National Gypsum Company, Wood Conversion Company, Armstrong Cork Company, and Dant & Russell, Inc., have contracted, combined and conspired in violation of Section 1 of an Act of Congress approved July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies", as amended, commonly known as the Sherman Act.

III. That each of the following agency agreements, and the following agreements entered into in connection therewith between Masonite Corporation and the other defendant corporations, as shown in the following table, is adjudged unlawful under the antitrust laws of the United States and is illegal, null and void:

<u>Title of Agreement</u>	<u>Company</u>	<u>Date</u>
Agency Agreement and License Option	Celotex Company	October 10, 1933
Supplemental Agreement	Celotex Company	October 10, 1933
Agency Agreement and License Option	National Gypsum Company	October 31, 1933
Agency Agreement and License Option	Johns-Manville Sales Corporation	November 30, 1933
Supplemental Agreement	Johns-Manville Sales Corporation	November 30, 1933
Agency Agreement and License Option	Armstrong-Newport Company	December 1, 1933
Supplemental Agreement	Armstrong-Newport Company	December 1, 1933
Agency Agreement and License Option	Hawaiian Cape Products Ltd.	December 4, 1933
Agency Agreement and License Option	Wood Conversion Company	June 25, 1934
Supplemental Agreement	Wood Conversion Company	June 25, 1934
Agency Agreement and License Option	Insulite Company	February 2, 1935
Supplemental Agreement	Insulite Company	February 2, 1935
Export Agreement	Insulite Company	February 2, 1935
Supplemental Agreement	Insulite Company	February 8, 1935
Del Credere Factor's Agreement	Celotex Corporation	October 29, 1936

<u>Title of Agreement</u>	<u>Company</u>	<u>Date</u>
Del Credere Factor's Agreement	National Gypsum Company	October 29, 1936
Del Credere Factor's Agreement	Johns-Manville Sales Corporation	October 29, 1936
Del Credere Factor's Agreement	Armstrong Cork Company	October 29, 1936
Del Credere Factor's Agreement	Wood Conversion Company	October 29, 1936
Del Credere Factor's Agreement	Insulite Company	October 29, 1936
Del Credere Factor's Agreement	Hawaiian Cane Products Ltd.	October 29, 1936
Supplemental Agreement	Armstrong-Newport Company	October 29, 1936
Supplemental Agreement No. I	Celotex Corporation	October 29, 1936
Supplemental Agreement No. II	Celotex Corporation	October 29, 1936
Supplemental Agreement No. III	Celotex Corporation	October 29, 1936
Supplemental Agreement No. IV	Celotex Corporation	October 29, 1936
Supplemental Agreement	Hawaiian Cane Products Ltd.	October 29, 1936
Supplemental Agreement No. I	Insulite Company	October 29, 1936
Supplemental Agreement No. II	Insulite Company	October 29, 1936
Supplemental Agreement No. III	Insulite Company	October 29, 1936
Supplemental Agreement No. IV	Insulite Company	October 29, 1936
Supplemental Agreement	Johns-Manville Sales Corporation	October 29, 1936
Supplemental Agreement	National Gypsum Company	October 29, 1936
Supplemental Agreement	Wood Conversion Company	October 29, 1936
Del Credere Factor's Agreement	Flintkote Company	March 16, 1937
Del Credere Factor's Agreement	Dant & Russell, Inc.	June 19, 1937
Agreement	Insulite Company	February 1, 1938
Letter Agreement	Celotex Corporation	September 1, 1940
Letter Agreement	Certain-Teed Products Corporation	September 1, 1940
Letter Agreement	Johns-Manville Sales Corporation	September 1, 1940
Letter Agreement	Insulite Company	September 1, 1940
Letter Agreement	Flintkote Company	September 1, 1940
Letter Agreement	National Gypsum Company	September 1, 1940

<u>Title of Agreement</u>	<u>Company</u>	<u>Date</u>
Letter Agreement	Wood Conversion Company	September 1, 1940
Letter Agreement	Armstrong Cork Company	September 1, 1940
Letter Agreement	Dant & Russell, Inc.	September 1, 1940
Appointment of Agent Agreement	Celotex Corporation	March 20, 1941
Appointment of Agent Agreement	Certain-teed Products Corporation	March 20, 1941
Appointment of Agent Agreement	Johns-Manville Sales Corporation	March 20, 1941
Appointment of Agent Agreement	Insulite Company	March 20, 1941
Appointment of Agent Agreement	Flintkote Company	March 20, 1941
Appointment of Agent Agreement	National Gypsum Company	March 20, 1941
Appointment of Agent Agreement	Wood Conversion Company	March 20, 1941
Appointment of Agent Agreement	Armstrong Cork Company	March 20, 1941
Appointment of Agent Agreement	Dant & Russell, Inc.	March 20, 1941
Appointment of Agent Agreement	Hawaiian Cane Products Ltd.	March 31, 1941
Supplemental Agreement	Celotex Corporation	April 7, 1941
Supplemental Agreement Re Agreement of February 1, 1938	Insulite Company	March 20, 1941
Supplemental Agreement Re Export Agreement	Insulite Company	March 20, 1941

IV. That the defendant corporation and their directors, officers, agents, employees, representatives, successors, subsidiaries, and any person acting or claiming to act under, through or for them or any of them, be and they hereby are perpetually enjoined and restrained:

(1) From enforcing or attempting to enforce any provision in any agreement referred to in Paragraph III above, and from doing any further acts thereunder.

(2) From entering into, adhering to, maintaining or furthering any contract, agreement, understanding, ar-

rangement, plan, or program among themselves or any of them.

- (a) To fix, maintain, or stabilize prices for hardboard.
 - (b) To divide, classify, or allocate customers for hardboard.
 - (c) To restrict, limit, or otherwise restrain competition in the manufacture, sale or distribution of hardboard, but this clause shall not be deemed to interfere with the lawful exercise of lawful patent privileges.
 - (d) To use patent privileges, patents, or patent applications relating to hardboard to secure protection from competition beyond the lawful limits of patent rights.
- (3) From entering into any agreement or arrangement or plan in restraint of interstate trade and commerce or to monopolize interstate trade and commerce so similar to the agreements, arrangements or plans adjudged to be unlawful in Paragraphs II and III of this judgment as to constitute a continuation, repetition, or revival thereof.

V. For the purpose of conforming to the mandate of the Supreme Court of the United States rendered in this cause upon appeal to that Court, and looking toward conforming to the provisions of this judgment, Masonite Corporation is entering into a new Factor's agreement with each of the other defendant corporations, except Insulite Company, and a like agreement with Minnesota and Ontario Paper Company which, since the trial of this cause, has acquired substantially all the assets of Insulite Company

and succeeded to all its rights and liabilities, a copy of the form of which agreement has been marked Exhibit A and annexed hereto. Said new agreements are hereby determined by the Court to be not inconsistent with the mandate of the Supreme Court in this cause.

VI. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this decree, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof, and for such further orders, directions or relief as may be necessary or appropriate to remove or prevent the misuse (whether past, present or future, if any) of patent rights relating to hardboard in violation of the Sherman Law.

VII. That the plaintiff recover from the defendants its costs herein as taxed in the sum of \$398.70 and that execution issue therefor.

Approved:

ALFRED C. COXE,
United States District Judge.

Dated the 1st day of October, 1942.
Judgment rendered October 21st, 1942.

GEORGE J. H. FOLLMER,
Clerk.
W D

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1950.

No. 30

UNITED STATES OF AMERICA,

Appellant,

vs.

UNITED STATES GYPSUM COMPANY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA.

**BRIEF FOR CERTAIN-TEED PRODUCTS
CORPORATION, APPELLEE,**

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Products Corporation.*

NORMAN A. MILLER,
Of Counsel.

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IN THE
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OCTOBER TERM, 1950.

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UNITED STATES OF AMERICA,

Appellant,

vs.

UNITED STATES GYPSUM COMPANY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA.

**BRIEF FOR CERTAIN-TEED PRODUCTS
CORPORATION, APPELLEE.**

PRELIMINARY STATEMENT.

This brief is submitted on behalf of appellee, Certain-teed Products Corporation (hereinafter referred to as "Certain-teed"), one of the licensees under patents relating to gypsum board owned by United States Gypsum Company (sometimes hereinafter referred to as "USG"). The paragraphs of the Government's brief relating to prior opinions, jurisdiction and statute involved are hereby adopted.

QUESTIONS PRESENTED.

1. Whether the judgment of the district court entered pursuant to summary judgment proceedings, affords adequate relief.

2. Whether the judgment of the district court should be modified so as to impose additional restrictive injunctions upon the appellees, or any of them.

STATEMENT.

In the main, the Statement in the Government's brief (pp. 5-16) sets out the prior proceedings. However, such statement is deficient in failing to state the narrow ground upon which the Government rested its motion for summary judgment before the district court. This ground was that, in view of the opinion of this Court reversing the judgment of dismissal entered by the district court in *U. S. v. U. S. Gypsum Co.*, 333 U. S. 364, the Government had only to establish a plurality of license agreements among competitors in the gypsum industry with price limitation adhered to by each of the licensees with knowledge of the adherence of the others, and that all other abuses falling within the traditional prohibitions of the Sherman Act could be laid aside (R. 33).*

* The letter "R" refers to the record on this appeal.

SUMMARY OF ARGUMENT.

I.

The judgment of the district court, entered upon the Government's motion for summary judgment, effectively terminates the practices condemned by this Court and the effects thereof, and is adequate and effective to prevent further violations of the Sherman Act by the appellees and to dissipate the effects of their past illegal conduct.

A.

The district court was vested with large discretion to model its judgment to fit the exigencies of the case before it.

B.

The judgment of the district court was in accordance with and pursuant to the prior opinion of this Court in *U. S. v. U. S. Gypsum Co., supra*.

II.

The district court did not err in eliminating from its judgment the visitation provision sought by the Government.

III.

The judgment of the district court in assessing only one-half of the costs against the appellees did not constitute an abuse of its discretion.

ARGUMENT.

I.

The basic factor underlying any consideration of the issues on the Government's appeal is that the judgment appealed from in this case was not entered after trial on the merits. Rather, the judgment was entered after granting the Government's motion for summary judgment (R. 102-3). Throughout its argument below in support of its motion for summary judgment the Government took the position that having shown price control through the execution of the license agreements to which all appellees had adhered with knowledge of the adherence of the others, the Government was entitled to the entry of a summary judgment (R. 33, 44-47, 92). The district court clearly understood that the motion for summary judgment was so limited (R. 102-103, 109-113, 138-141). Having secured exactly the kind of decree which it sought by moving for summary judgment, we submit that the Government is not now entitled to secure the entry of a judgment granting injunctive relief against alleged violations which were outside the scope of the motion for summary judgment. The Government secured its summary judgment by adherence to a limited and narrow issue. It thus avoided a trial on other controverted issues of fact raised by the pleadings. The summary judgment proceedings were an opening wedge employed to avoid trial; the issues then were narrowly stated; the district court refused to permit the wedge to be enlarged, but the Government now seeks a broad judgment such as might be entered after a trial had been had on all of the issues involved and as if the district court had determined all disputed facts adversely to the appellees. We submit that the Gov-

ernment should not and cannot have it "both ways." The judgment of the district court on the limited issue it was called upon to determine under the Government's motion for summary judgment granted to the Government all the relief to which it was entitled as to such issue and gave effective and adequate protection of the public interest.

In connection with the Government's argument in support of its request for broader injunctive relief, an attempt is made to discredit the proffer of proof made by the appellees because such proffer was not supported by affidavits (pp. 30-31, Govt. br.). The motion for summary judgment was made under Rule 56 of the Federal Rules of Civil Procedure which provides that the judgment sought should be rendered if the pleadings, depositions and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact. The proffer of proof was made at the district court's request, merely to inform the Court of the facts in controversy and those which were admitted. The appellees never denied the existence of the license agreements the validity of the price-fixing provisions of which was the focal point at issue on the prior appeal to this Court, and since the Government based its motion for summary judgment upon the absence of any controverted fact on this issue, the question whether the proffer was supported by affidavits or not was considered to be and is not material. The appellees filed no affidavits to resist the motion for summary judgment because the Government limited its motion in the manner aforesaid and the appellees admitted the facts with relation to the particular ground upon which the motion for summary judgment was made. Furthermore, the Government took no exception to the consideration of appellees' proffer of proof by the district court (R. 89) and the Government

did not include any such point in its assignment of errors (R. 197-8).

In considering whether the judgment of the district court should be modified and amended as the Government seeks to do, it should be borne in mind that the task of framing an appropriate decree rests with the district court, which is invested with a broad discretion. This principle is stated by this Court in *International Salt Co. v. U. S.*, 332 U. S. 392, 400-401, where the Court said:

“The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case. *United States v. Crescent Amusement Co.*, 323 U. S. 173, 185 * * *; *United States v. National Lead Co.*, 332 U. S. 319 * * *.”

In determining in that case that the decree of the district court should not be altered because of the principle announced above, this Court took into consideration and gave considerable weight to the fact that the decree also provided for retention of jurisdiction by the district court for the purpose of enabling the parties to make application for such further orders and directions as might be necessary or appropriate for the construction or carrying out of the judgment. A similar provision is contained in the judgment entered by the district court in this case. The decree of the district court in *International Salt Co. v. U. S.*, *supra*, was entered upon a motion for summary judgment, but it affirmed the decree of the district court on the ground that it had not abused its discretion.

Particularly applicable to the case at bar is the decision of this Court in *Associated Press v. U. S.*, 326 U. S. 1, 22-23. In that case also the decree which the Government sought to broaden was entered upon a motion for summary judgment. This Court refused to do so, saying:

"The fashioning of a decree in an Anti-trust case in such way as to prevent future violations and eradicate existing evils, is a matter which rests largely in the discretion of the Court. *United States v. Crescent Amusement Co.*, 323 U. S. 173, * * *. A full exploration of facts is usually necessary in order properly to draw such a decree. In this case the government chose to present its case on the narrow issues which were within the realm of undisputed facts. In the situation thus narrowly presented we are unable to say that the Court's decree should have gone further than it did. Furthermore, the District Court retained the cause for such further proceedings as might become necessary. If, as the government apprehends, the decree in its present form should not prove adequate * * *, the Court's retention of the cause will enable it to take the necessary measures to cause the decree to be fully and faithfully carried out."

We submit that the principles laid down by this Court with regard to the fashioning of a decree in antitrust cases where the judgment has been entered on motions for summary judgment are the principles which should be followed in this case, and not those announced in the cases cited by the Government, which, with the exception of *International Salt Co. v. U. S.*, *supra*, are cases in which a trial of all issues involved in the case was had.

The Government has stated that where the judgment entered below does not adequately protect the public interest, this Court has not hesitated to direct a revamping of the judgment (p. 23, Govt. br.). This does not mean, however, that this Court will sit as at *nisi prius* and enter such decree as the Government proposes, but simply that the power to *review* is present. An examination of the cases cited in support of the Government's statement clearly shows that they have no application to the situation here presented. In *Standard Oil Co. v. U. S.*, 221 U. S. 1, the decree of the trial court was affirmed except as to minor matters. In *U. S. v. American Tobacco Co.*, 221

U. S. 106, the relief was broadened because this Court found that the violations were broader than found by the lower court. This is not our situation, as Article 3 of the judgment of the district court establishing the violations of the Sherman Act by these appellees was affirmed by this Court on May 29, 1950 (339 U. S. 960). In *U. S. v. Crescent Amusement Co.*, 323 U. S. 173, this Court recognized the general rule of the wide range of discretion in the district court to mold the decree to the exigencies of the particular case, but because the proclivity for unlawful activity was so manifest, this Court felt that the decree of the district court should be revised. This is not true of the situation existing here because the appellees in good faith entered into the licensing agreements fixing prices and adhered to the same, relying upon the decision of this Court in *U. S. v. General Electric Co.*, 272 U. S. 476. In *U. S. v. Paramount Pictures, Inc.*, 334 U. S. 131, this Court eliminated a competitive bidding provision which it felt would merely increase the defendant's control and would require constant and close judicial supervision. In none of these cases cited by the Government (pp. 23-24, Govt. br.) was a summary judgment involved.

The judgment of the district court and the injunctive relief provided for therein terminates and dissipates the practices condemned by this Court and provides adequate and effective safeguards against the continuation, revival or renewal thereof. After finding in Article III of the judgment of the court below that "the defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of Sections 1 and 2 of the Sherman Antitrust Act", the court adjudges in Article IV of the decree that "each of

the license agreements * * * is unlawful under the anti-trust laws of the United States and illegal, null and void." In Article V, the district court judgment enjoined and restrained each of the defendant companies from (1) the further performance or enforcement of any of the provisions of the patent licenses, including any price bulletin issued thereunder; (2) entering into or performing any agreement or understanding among the defendants, or any of them, for the purpose or with the effect of continuing, reviving or reinstating any monopolistic practice; (3) entering into or performing any agreement or understanding among the defendants, or any of them, in restraint of trade and commerce in gypsum board among the several states in the eastern territory of the United States by license agreements to fix, maintain or stabilize prices of gypsum board or the terms and conditions of sale thereof (R. 189).

Under the provisions of the district court judgment, set out above, the existing license agreements are terminated for all time and future price-fixing in the gypsum board industry is effectively prevented. Although the Government charged the appellees with other means of suppressing and stabilizing gypsum products other than gypsum board, all disputed by the appellees, no determination was, nor could it have been, made of such disputed issues without a trial of the case. The Government by its motion for summary judgment sought to and did avoid a trial on these disputed issues. Therefore, on the record before this Court, the appellees' actions must be limited to their conduct under the license agreements.

The judgment of the district court effectively destroys any monopoly resulting from the issuance of the industry-wide licenses and enjoins each appellee from entering into or carrying out any understanding or agreement, the effect of which would be to continue, revive or reinstate any monopolistic practice. Said judgment provides for

retention of jurisdiction for the purpose, among other things, of enforcing compliance therewith. We, therefore, believe that the Government's fears as to the inadequacy of the injunctive provisions of said judgment are not based on any fact. As this Court said in *U. S. v. National Lead Co.*, 332 U. S. 319, 348:

"Assuming, as is justified, that violation of the Sherman Act in this case has consisted primarily of the misuse of patent rights placing restraint upon interstate and foreign commerce, that conduct is not before this Court for punishment. It is brought before this Court in order to secure an order for its immediate discontinuance and for its future prevention. That will be accomplished largely through the strict prohibition of further performance of the provisions of the unlawful agreements. Further assurance against continued legal restraints upon interstate and foreign commerce through misuse of these patent rights is provided through the compulsory granting to any applicant therefor of licenses at uniform, reasonable royalties under any or all patents defined in the decree."

As was said by this Court in *Hartford-Empire Co. v. U. S.*, 323 U. S. 386, 409-10,

"The Sherman Act provides criminal penalties for its violation, and authorizes the recovery of a penal sum in addition to damages in a civil suit by one injured by violation. It also authorizes an injunction to prevent continuing violations by those acting contrary to its proscriptions. The present suit is in the last named category and we may not impose penalties in the guise of preventing future violations. * * * the Court may not * * * place the defendants, for the future, 'in a different class than other people', * * *. The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt;' enjoin 'all possible breaches of the law;' or cause the defendants hereafter not 'to be under the protection of the law of the land'."

Similarly, in *National Labor Relations Board v. Express Pub. Co.*, 312 U. S. 426, 435-36, this Court said:

“A Federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant’s conduct in the past. But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. This Court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus disassociated from those which a defendant has committed.”

The decree which the Government proposes (App. A, pp. 65-75 and pp. 13-16, Gov’t br.) goes far beyond the matters proved and decided in this case and attempts to include provisions which are entirely unrelated to the proscribed act of accepting and adhering to the license agreements containing price-fixing agreements entered into with USG. The matters sought to be included by the Government in its proposed judgment would include all gypsum products and every activity in the sale, production and distribution thereof. We submit that such matters are wholly outside the scope of the final determination of this case made on the motion for summary judgment. Such provisions clearly would “put the whole conduct of appellees’ business at the peril of a summons for contempt” and are prohibited under the principle laid down by this Court in *Hartford-Empire Co. v. U. S.*, *supra*. Illustrative of the Government’s position is subparagraph 5 of

Article V of its proposed judgment (pp. 68-70, Govt. br.). It seeks by this provision to determine the issue decided in *Federal Trade Commission v. Cement Institute, Inc.*, 333 U. S. 683, after years of litigation and to impose its views on basing point delivered price systems on the entire gypsum industry without any trial or consideration of the issues involved. In so far as the use of the basing point system was involved in the determination made by the court below, it was confined to bulletins issued under the license agreements. The judgment of the district court has stricken down such license agreements and the bulletins as part and parcel thereof. The injunction against a basing point delivered price system not confined to gypsum board but extended to the entire gypsum industry is manifestly far beyond the scope of the issues determined by the district court in entering the summary judgment.

At pages 24 to 43, both inclusive, the Government argues that it is entitled to the injunctive provisions contained in its proposed judgment. In connection therewith, we wish to point out that the judgment of the district court did exactly what this Court approved in *Ethyl Gasoline Corp. v. U. S.*, 309 U. S. 436, and other cases cited by the Government. It suppressed the license agreements by which the unlawful control of the gypsum board industry was maintained, and effectively pried open the gypsum board industry to competition. The so-called narrow scope of the district court judgment complained of by the Government was directly the result of the Government's decision to present its case on the narrow issues which were within the realm of undisputed facts. *Associated Press v. U. S.*, *supra*. All the restrictive provisions which the Government proposes to have included in the decree are dictated not by the terms of the license agreements or the bulletins issued pursuant thereto, but by charges made

in the Government's complaint and controverted in appellees' pleadings, and which were eliminated by the Government's motion for summary judgment. The Government is seeking broad injunctive relief to which it would only be entitled, if at all, if the appellees, having had their day in court and having introduced evidence in support of the controverted issues of fact, had been found guilty of violation of the Sherman Act with regard to such controverted matters.

The fact that the decree below does not contain all of the injunctive provisions sought by the Government, does not demonstrate that the district court in modelling its decree to fit the exigencies of this particular case abused its inherent discretion. The Government saw fit to take the position on its motion for summary judgment that a mere plurality of licenses among competitors in an entire industry upon price limitations adhered to by each with knowledge of the adherence of others, was, without more, a violation *per se* of the Sherman Act, and therefore all of the causes usually constituting a violation of the Sherman Act could be laid aside and ignored. Having taken such position and having secured a summary judgment based thereon, it cannot now press for injunctive relief on matters outside the scope of said summary judgment. Indicative of the extent to which the Government seeks to broaden the scope of the judgment is the argument made that the judgment leaves the appellees free to enter into price-fixing patent licenses with respect to sales in the Pacific Coast area (pp. 34-35, Govt. br.). We submit that this argument is patently absurd as the judgment of the district court clearly establishes price-fixing patent licenses to be illegal and therefore no matter where such price fixing was sought to be carried out through patent licenses, whether on the Pacific Coast or in the eastern territory, such action would be illegal. The Government's

argument presumes that the appellees in the face of a decree establishing illegality of such a license, would violate the judgment. With regard to the application of the Government's proposed judgment to products other than gypsum board, we submit that the inclusion of such products is wholly outside the scope of anything determined on the motion for summary judgment.

The decree entered in the district court, after reversal of the judgment below by this Court, in *U. S. v. Masonite*, 316 U. S. 265, is very similar in scope and form to the judgment of the district court here appealed from. The Masonite decree was considered and discussed in the arguments before the district court upon the proposed decrees submitted by the Government and USG, and quite evidently was given considerable application in the judgment of its own making entered by the district court.

In view of the foregoing considerations, we submit that the Government's criticism of the district court judgment is without merit and that the specific injunctive relief which is sought in the Government's proposed injunction goes far beyond that to which it is entitled. This Court has repeatedly taken the position, as stated by Mr. Justice Frankfurter in his dissenting opinion in *International Salt Co. v. U. S.*, *supra* (p. 403):

"* * * when a court condemns practices as violative of the Sherman Law * * *, it has the duty so to fashion its decree as to put an effective stop to that which is condemned. But the law also respects the wisdom of not burning even part of a house in order to roast a pig. Ordinarily, therefore, when acts are found to have been done in violation of antitrust legislation, restraint of such acts in the future is the adequate relief. See *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 404, * * *; *Standard Oil Co. v. United States*, 221 U. S. 1, 77,

* * * ; *National Labor Relations Bd. v. Express Pub. Co.*, 312 U. S. 426, 435, 437, * * *."

To the same effect, see also *U. S. v. National Lead Co.*, *supra*, and *Hartford-Empire Co. v. U. S.*, *supra*.

Inherent in the principle that the district court should draw the decree to meet the exigencies of the particular case is the consideration which should be given to the good faith of the appellees in acting under their interpretation of their rights as determined in *United States v. General Electric Co.*, *supra*. While good faith will not relieve the appellees of the violation of the Sherman Act of which they stand adjudged, the intent, conduct and good faith of the appellees are matters properly to be considered by the district court in drawing a decree within its discretion which will prevent the continuance or recurrence of the violation being enjoined.

We submit that this consideration and the narrow issues presented by the Government of its own choice on the motion for summary judgment are the considerations which caused, and properly so, the district court to enter the judgment from which the Government appeals, and that the Government should not be heard to complain of the result it invited.

II.

Under Article VIII of the Government's proposed judgment (pp. 73-74, Govt. br.), the Government seeks the right to have authorized representatives of the Department of Justice, upon the written request of the Attorney General or an Assistant Attorney General, examine the appellees' books and records and interview their officers or employees with reference to matters contained in the judgment. The district court determined that such a provision was not necessary in the instant case for the protection of any

public interest. The district court decided, as it did in connection with the specific injunctive relief sought by the Government, that this matter was outside the scope of the issues determined by it upon the Government's motion for summary judgment.

We submit that in refusing to include the visitation provision the district court did not abuse the discretion vested in it to fit the judgment to the exigencies of this case. As was said in *U. S. v. Bausch & Lomb Co.*, 321 U. S. 707, 727 the circumstances of each case control the breadth of the order.

The fact that many litigants have accepted such a provision is not authoritative. It may well indicate a lack of vigilance against encroachment upon their rights. Under the facts which were considered by the district court on the motion for summary judgment, the inclusion of a visitation provision such as is sought by the Government, would infringe substantive rights of appellees, and the district court properly refused to include such a provision in the judgment entered by it. The appellees should not be placed "in a different class than other people." *Hartford-Empire v. U. S.* *supra*.

III.

In Article IX of its proposed decree (p. 74, Govt. br.) the Government seeks to tax all of the costs of the proceeding against the appellees. It is argued by the Government that the district court's judgment requiring the Government to pay one-half of the costs resulted from an erroneous determination that a violation of the Sherman Act, resulting from a mistaken view as to the law's scope, is not a full-fledged violation of the statute (p. 62, Govt. br.). This statement of the Government is without any foundation. The district court determined, acting within its sound dis-

cretion, that in view of the limited nature of the matters presented by the Government's motion for summary judgment, no evidence was necessary to sustain such motion except those facts which the appellees admitted. Such motion was based upon the views expressed by this Court in *U. S. v. U. S. Gypsum, supra*, and heretofore commented upon. Prior to this Court's opinion, the case was tried by the Government on a theory which the district court held was not sustained. *U. S. v. U. S. Gypsum*, 67 F. Sup. 397. Under these circumstances, to tax all the costs against the appellees would be unjust and the district court so decided. As we have previously shown, this Court has uniformly held that trial courts are generally vested with "a large discretion to model their judgments to fit the exigencies of the particular case". This is particularly true with respect to costs in equity proceedings such as in the instant case. In *Kansas City So. Ry. Co. v. Guardian Trust Co.*, 281 U. S. 1, 9, this Court said:

"In actions at law costs follow the result as of course, but in equity costs not otherwise governed by statute are given or withheld in the sound discretion of the court according to the facts and circumstances of the case."

Rule 54(d) of the Rules of Civil Procedure provides in pertinent part as follows:

"(d) *Costs*. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court directs otherwise."

In *Prudence-Bonds Corp. v. Prudence Realization Corp.*, 174 F. (2d) 288 (C. A.-2), in affirming an order as to costs, the Court of Appeals said:

"But the sole issue is one of apportionment of costs, which is a matter left to the sound discretion of the district judge. We see no abuse of discretion justifying our interference."

Chicago Sugar Co. v. American Sugar Refining Co., 176 Fed. (2d) 1, 11 (C. A.-7), cited by the Government, is not in conflict with the general rule stated above. The Court of Appeals in that case said, in addition to the quotation therefrom appearing at page 63 of the Government's brief:

"* * * where it is clear that the action was brought in good faith, involving issues as to which the law is in doubt, the court may in its discretion require each party to bear its own costs although the decision is adverse to plaintiff."

On the particular facts involved in that case the Court of Appeals determined it was error to tax half the costs against the plaintiff because there were no issues involved as to which the law was in doubt. In the case at bar the appellees in good faith relied on the decision of this Court in *U. S. v. General Electric Co.*, *supra*, as they interpreted it. That there is still doubt as to the doctrine announced in *U. S. v. General Electric*, *supra*, is attested by the majority, concurring and dissenting opinions of this Court in *U. S. v. Line Material Co.*, 333 U. S. 287. The district court certainly considered that there was doubt as to the law upon the issues involved and it directed the taxation of costs accordingly.

Conclusion.

For the reasons stated, the judgment of the district court should be affirmed. The Government has made no adequate showing that the district court abused its discretion in entering its judgment. The judgment adequately covers everything which the Government sought and was entitled to on its motion for summary judgment. Having chosen to present its case on the narrow issues which were within the realm of undisputed facts, the Government must accept the form of decree which could be properly

entered upon such a narrow issue. It cannot now contend that it is entitled to a judgment based on the assumption that all the controversial issues of fact have been determined against the appellees without any opportunity for such appellees to have their day in court. We submit that all the Government's apprehensions regarding the judgment entered by the district court are unfounded. However, the district court's retention of jurisdiction in this case will enable it to take any and all measures necessary in the remote and speculative event that the judgement should prove inadequate.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1950.

No. 30.

THE UNITED STATES OF AMERICA, Appellant,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, Doing Business Under the Name of Texas Cement Plaster Company; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMPKINS.

On Appeal from the United States District Court for the District of Columbia.

BRIEF FOR APPELLEE, THE CELOTEX CORPORATION.

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On Appeal from the United States District Court for the
District of Columbia.

**BRIEF FOR APPELLEE, THE CELOTEX
CORPORATION.**

PRELIMINARY STATEMENT.

This brief is submitted on behalf of appellee, The Celotex Corporation (Celotex), a licensee under patents relating to gypsum board owned by United States Gypsum Company (USG). We adopt the Government's paragraphs relating to Prior Opinions, Jurisdiction and Statute Involved.

QUESTION PRESENTED.

Whether the provisions of the decree of the District Court should be changed by direction of this Court to impose additional restrictive injunctions upon Celotex, a licensee.

STATEMENT.

Celotex entered the gypsum board industry for the first time in 1939, when the licensing plan was fully in effect, by acquiring the assets and licenses of American Gypsum Company (333 U. S. 369). Celotex would have proven, if it had been permitted to do so, that its purpose in acquiring the assets and licenses of American Gypsum Company (American) was to enable it to broaden the line of products which it could offer for sale in competition with other manufacturers in the building materials industry (SR.* 160).

In acquiring the assets of American in 1939, Celotex was required to take over the license agreement between American and USG, dated November 25, 1929 (Govt. Ex. No. 13, R. 4446, 4455). By the terms of this license agreement, American had agreed not to sell its assets without requiring the purchaser to assume all of the obligations of American under the license. That license agreement provided (R. 4454-5):

“5. It is expressly understood and agreed that the license herein granted shall be personal to the Licensee, and that the same or any right herein or thereunder shall not be sold or assigned or transferred without the written consent of Licensor, or transferred by operation of law; Provided, However, that the same may be assigned by Licensee to any company acquiring all the assets and business or all of the capital stock of Licensee, on condition that Licensee shall first obtain an agreement in writing from any such assignee agreeing to assume all of the obligations of Licensee under

* The letters SR. have been chosen to designate the record on this appeal, to contrast with the letter R. which refers to the printed record on the previous appeal.

this agreement and to be bound by all of the terms and conditions hereof and shall deliver such agreement to Licensor. Licensee agrees not to sell all of its assets and business or all of its capital stock or to transfer and convey its plasterboard and/or wallboard business, or its assets used in connection therewith, without requiring the purchaser or purchasers thereof to assume, in writing, all of the obligations of Licensee hereunder, including the assumption of the claim which Licensor has against Licensee for damages for infringement of its said patents and the agreements in settlement and discharge thereof, as in this contract contained, and to agree to be bound by all of the terms and conditions of this contract, and deliver such agreement to Licensor."

Celotex acquired American through purchase of its capital stock and in connection with the complete liquidation of American, as of April 12, 1939, received from American an Assignment and Bill of Sale (Govt. Ex. No. 14, R. 4469-70), in which was included the following reference to the license agreement (R. 4470):

"3. The Grantee hereby agrees to assume all the liabilities of the Grantor as shown on its balance sheet of even date herewith and hereby agrees to assume all of the obligations of the Grantor as Licensee under its above mentioned agreement with United States Gypsum Company, and hereby assumes the claim which said United States Gypsum Company has against the Grantor for damages for infringement of said United States Gypsum Company's patents and the agreements in settlement and discharge thereof as in said agreement contained; and agrees to be bound by all of the terms and conditions of said agreement between said United States Gypsum Company and the Grantor."

In the nature of the case, Celotex had no part in the negotiations with respect to the issuance of the license to American in 1929 (Govt. Brief on first appeal, p. 89). Celotex has offered to prove that (SR. 160-1):

"The observance by Celotex of any of the terms and provisions of the license, as charged in this case to have been unlawful or improper, was not the result of any voluntary act on the part of Celotex but constituted solely the observance of contractual relations and obligations which it inherited from American and which it was legally obligated to observe unless it sought to escape the observance thereof on the ground of the invalidity of the terms of the license. Upon Celotex becoming obligated to carry out the terms of the license, it was advised by counsel that the provisions of the license were valid and enforceable and that Celotex was legally obligated to observe the same.

"During the sixteen months period to August 15, 1940, the date of the filing of the complaint in this cause, Celotex continued, in the *bona fide* belief that it was obligated legally so to do, to observe the terms of the license. Since July 8, 1941, when Celotex was advised that the Haggerty patent had expired, Celotex has not observed any price limitation under the license, and its observance of the terms of the license has been solely with respect to payments of the royalties payable thereunder in order to prevent the cancellation of the license to use the patents thereunder which Celotex was advised and believed and still believes are valid."*

There is no proof in the record of this case which would contradict or qualify the facts set forth above. There is no evidence in this case indicating the existence of any agreement, understanding, combination or concert of action between Celotex and USG or between Celotex and any of the other licensees, beyond the license agreements and observance of the price bulletins issued by USG pursuant thereto.

* The effort made by the Government to remove from consideration the proffers of proof made by defendant appellees (Govt. Br., pp. 30-31) comes too late to warrant consideration by this Court. The Government took no exception to the consideration of defendants' proffers by the District Court (SR. 89), and even though that court did consider the proffers in reaching its judgment (SR. 102-3), the Government did not include this point in its assignment of errors (SR. 197-8).

SUMMARY OF ARGUMENT.

There is no need or justification for changing the terms of the decree issued by the District Court for the purpose of imposing additional restrictions upon Celotex, a licensee. That decree is effective to eradicate the combination which has been adjudicated unlawful, and its effects, and to restore competitive conditions in the industry by striking off the fetters contained in the offending license agreements. Celotex has shown no proclivity to unlawful conduct which would justify including in the decree provisions restraining it from otherwise lawful activities.

ARGUMENT.

The District Court Decree Should Not Be Changed to Impose Additional Restrictions Upon This Licensee.

Celotex was a late-comer to the gypsum board industry and ultimately gained access to that field as a manufacturer only in 1939, about 16 months before the complaint was filed in this proceeding. Celotex has offered to prove that its motive in seeking to enter into the manufacture of gypsum board was to broaden the line of its products which it could offer for sale, i.e., to strengthen the competitive position of Celotex, also a manufacturer of fiber insulating board, in the building materials industry. One result of the entrance of Celotex into the gypsum board industry was the replacement of American, whose operations were confined to a single gypsum plant, by a company which could offer stronger competition because of the greater variety of products which it produced and sold.

Celotex assumed the obligations of American under a license from USG, and during the period from April, 1939, to July, 1941, when Celotex ceased to observe any price limitations under this license, USG determined and fixed the minimum prices, terms and conditions of sale of the gypsum board manufactured and sold by Celotex, as a

licensee of USG (SR. 161). Giving up to USG the power to fix its minimum prices for patented board was a part of the price which Celotex was required to pay to acquire an opportunity to manufacture and sell gypsum board, since it was advised by counsel that the provisions of the license from USG were valid and enforceable and that Celotex was legally obligated to observe the terms thereof (SR. 161). There is no other evidence in the record of this case of any activities by Celotex charged or found to be offensive under the Sherman Act.

When this case was last here on appeal (Dkt. No. 13, Oct. Term, 1947), this Court reversed the judgment of the District Court dismissing the complaint, stating (333 U.S. 389):

“We think that the industry-wide license agreements, entered into with knowledge on the part of licensor and licensees of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins, were sufficient to establish a *prima facie* case of conspiracy.”

And this Court said later in its opinion (333 U.S. 401):

“Even in the absence of the specific abuses in this case, which fall within the traditional prohibitions of the Sherman Act, it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices. That conclusion follows despite the assumed legality of each separate patent license, for it is familiar doctrine that lawful acts may become unlawful when taken in concert.”

This Court also concluded that Celotex was a party to the combination found to have existed, because it “entered the industry in 1939 when the licensing plan was fully in effect” (333 U.S. 369).

Upon remand of this case to the District Court, a motion for summary judgment in its favor was filed by the Government (SR. 144) and proffers of proof were submitted by

the defendants.* In support of the motion for summary judgment counsel for the Government stated (SR. 34-5):

"I think for purposes of present argument, although we do not waive the point, that many of the abuses such as the court refers to in this portion of its opinion, such as controlling plaster prices, perhaps controlling manufacturing distributors, fixing the size of truckloads, the amount of dunnage, eliminating jobbers—all of those abuses, if proven to have been done by concerted action would normally constitute a violation of the Sherman Act, can for purposes of this argument be laid to one side, and we can look simply to whether or not the defendants combined under patents/licenses, being erstwhile competitors covering an entire industry, and fixed prices."

After consideration of the Government's motion for summary judgment, the proffers of proof filed by defendants, and after hearing argument on both sides, the District Court granted the motion of the Government for summary judgment (SR. 102-3). It is evident that the District Court granted the Government's motion upon the premise that this Court had ruled as a matter of law "that the industry-wide license agreements, entered into with knowledge on the part of licensor and licensees of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins" established a violation of the statute (SR. 110-14, 119-23, 137, 138-41). Since there could be no dispute or contradiction of these basic facts the trial court granted summary judgment "on the fundamental question involved" (SR. 102-3; *United States v. Masonite Corporation*, 316 U. S. 265, 274 [1942]).

The decree which the District Court issued was promulgated prior to the introduction of any evidence by the defendants (333 U. S. 372). In the absence of a full hearing on the merits the District Court properly framed its decree within the realm of the undisputed facts. The decree struck

* Celotex, in addition to joining in the more complete proffer submitted on behalf of the defendants generally (SR. 31, 145-160), submitted a separate proffer (SR. 160-1).

down the offending license agreements as "illegal, null and void" (Art. IV, SR. 189), and enjoined Celotex, as well as the other defendants, from further performance of any of the provisions of the license agreements or any price bulletin issued thereunder, or from otherwise using license agreements as a means to fix, maintain or stabilize prices of gypsum board or the terms and conditions of sale thereof (Art. V, SR. 189).

Thus, the District Court reached and destroyed the whole of the substance of the combination which this Court found had existed, and effectively enjoined continuation or resumption of the combination and practices which have been adjudged to be in violation of the Sherman Act. In striking down the existing license agreements and the price bulletins issued thereunder, the District Court eradicated the means by which the offending control over prices and methods of distribution had been achieved, as well as the effects of that control (*Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 461 [1940]). Celotex, and the other licensees, are free to enter the market place prepared to compete in a myriad of ways for the patronage of prospective customers. There is nothing in the record of this case indicating that Celotex will not take full advantage of its opportunities for effective competition (*United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 729 [1944]).

The questions presented by the Government's appeal are whether the District Court went far enough in the injunctive provisions of the decree, and whether those injunctive provisions should be broadened "to assure, so far as may be practicable, that the wrongdoers shall not again violate the statute" (Govt. Br., p. 25).

The legal principles applicable to these questions are fairly summed up in the following extract from the opinion of this Court in *Hartford-Empire Co. v. U. S.*, 323 U. S. 386 [1945], at pp. 409-10:

"The applicable principles are not doubtful. The Sherman Act provides criminal penalties for its violation, and authorizes the recovery of a penal sum in

addition to damages in a civil suit by one injured by violation. It also authorizes an injunction to prevent continuing violations by those acting contrary to its proscriptions. The present suit is in the last named category and we may not impose penalties in the guise of preventing future violations. This is not to say that a decree need deal only with the exact type of acts found to have been committed or that the court should not, in framing its decree, resolve all doubts in favor of the Government, or may not prohibit acts which in another setting would be unobjectionable. But, even so, the court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, 'in a different class than other people', as the Government has suggested. The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt'; enjoin 'all possible breaches of the law'; or cause the defendants hereafter not 'to be under the protection of the law of the land.' "

Again, in *NLRB v. Express Pub. Co.*, 312 U. S. 426 [1941], at pp. 435-6, this Court said:

"A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past. But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. This Court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus dissociated from those which a defendant has committed."

On this record, and particularly on the limited ground upon which the Government sought and obtained the ad-

judication below, there is no basis for a conclusion that appellees have demonstrated a "proclivity to unlawful conduct" (*U. S. v. Paramount Pictures*, 334 U. S. 131, 147 [1948]). With particular regard to Celotex, the record shows that it entered the gypsum industry for the first time about 10 years after the licensing plan was fully in effect. It inherited from American contractual obligations, which counsel advised were valid, enforceable and legally binding upon Celotex, and Celotex merely carried out its obligations under the license agreement. Far from demonstrating a "proclivity to unlawful conduct", the record reflects an earnest effort by Celotex to stay within the limits of the law while still gaining entry into the gypsum board industry as a manufacturer, under a license agreement which was believed to be lawful under the decision of this Court in *United States v. General Electric Co.*, 272 U. S. 476.

The decree which the Government proposes (Govt. Br., App. A, pp. 65-75), goes far beyond the matters proved and decided in this case and attempts to include provisions which would enjoin otherwise legal activities, which are entirely unrelated to the proscribed acts of assuming and abiding by the terms of the former license agreement with USG.

The language in which the injunctive provisions proposed by the Government have been couched (Art. V, Govt. Br., pp. 68-70) is ambiguous and open to diverse interpretations. A major portion of the difficulty centers about the use of the words "or by other concerted action", and the relationship of those words, in this context, to the six numbered sub-paragraphs included within the proposed Article. The arguments urged by the Government in its Brief, however, show that the Government intends this language to be interpreted in the most inclusive manner. The Government implies (Govt. Br., pp. 28-29) that the injunctions it proposes are designed, *inter alia*, to bar "the concerted adoption and enforcement of a host of rules designed to restrain price competition and stabilize prices" and "con-

certed adherence to and policing of a delivered price basing point system."

The impropriety of adopting the form of decree proposed by the Government becomes particularly apparent upon consideration of those provisions which would:

a. include unpatented gypsum products (gypsum plaster, block, tile and Keene's cement) within the terms of the decree even though the license agreements dealt only with patents relating to gypsum board (*Art. II, 4, p. 66; Art. V, 1, p. 69);

b. prevent Celotex from entering into a patent license agreement with anyone, even though Celotex is the sole licensee, if the licensor attempted to reserve many of the rights to which he is legally entitled under the decision of this Court in *United States v. General Electric Co.*, 272 U. S. 476 (Art. V, 1, p. 69);

c. prevent Celotex from discontinuing the manufacture of any product, or a method of manufacturing, selling, packaging, shipping, delivering or distributing gypsum products should its action in so doing be coincident with similar action by another appellee, since there might arise an inference that there was concerted action (Art. V, 2, p. 69);

d. prevent Celotex from choosing its own customers, or classifying them in any manner, should a competitor independently make similar decisions, except at the risk of a summons for contempt (Art. V, 3 and 4, p. 69);

e. prevent Celotex from selling its products, at points more distant from its own source of supply than a competitor's plant, under any system of pricing which would match a competitor's price, even though it would be necessary to do so in order to sell (Art. V, 5, p. 69).

The proposals offered by the Government would place upon these licensees, including Celotex, restrictive injunctions which would hamper or destroy effective future com-

*References here are to sections and paragraphs of the form of judgment proposed by the Government, at pp. 65-75 of its brief.

petition in the industry. For example, there are strong reasons why producers, in situations similar to that of Celotex, should be allowed to manufacture and sell gypsum board which will conform to and be uniform with the board manufactured and sold by its larger competitors in the gypsum industry. Gypsum board is a synthetic building material which is accepted for use only after laboratory tests. Specifications prepared by architects and contained in building codes require a high degree of standardization of product. To impose upon each manufacturer the burden of selling its product as unique, instead of allowing it to be sold as a product conforming to or exceeding the minimum standards for all gypsum board, would be to stifle Celotex's competitive opportunities under an impossible load.

As the Government frankly admits, though perhaps inadvertently (Govt. Br., pp. 28-9), it is asking this Court to enjoin the possibility that the appellees may attempt activities similar to those which were found to be illegal in an entirely different context and upon voluminous records in *Sugar Institute, Inc. v. United States*, 297 U. S. 553, and *Federal Trade Commission v. Cement Institute, Inc.*, 333 U. S. 683. The additional injunctive provisions which the Government seeks would be justified, if at all, only after the appellees had been afforded an opportunity to be heard and if, thereafter, they had been adjudged to have violated, or to have threatened violations of, the Sherman Act, in the same manner as the offenders in the cited cases. Imposing additional restraints upon these appellees without giving them an opportunity to present their defenses would be to "impose penalties in the guise of preventing future violations" (*Hartford-Empire Co. v. United States*, 323 U. S. 386, 410), and no such extension of the injunctive provisions of the decree beyond the issues considered and decided in this case is warranted.

All of the restrictive provisions which the Government proposes to have inserted in the decree are directed toward terms and conditions which USG independently imposed upon its licensees for its own protection through the price

bulletins (Defendants' proffer of proof, SR. 157-9). The effectiveness of the price bulletins has, of course, been destroyed by the nullification of the license agreements, which the licensees believed authorized their issue, as well as by the specific language of the decree. There has not been, nor is there threatened, any combination or agreement outside of the license agreements.

The factual situation here presented differs in principle from that considered in the case of *Local 167 v. United States*, 291 U. S. 293 [1934], upon which the Government strongly relies. There the decree under review enjoined appellants from using any of the offices or positions in the unions "for the purpose of coercing marketmen to buy poultry, poultry feed, or other commodities necessary to the poultry business from particular sellers thereof". However, the evidence there was "that delegates of the unions coerced marketmen to use coops of a company that had or sought to secure a monopoly of such facilities and charged excessive rentals for them" (291 U. S., at p. 299). The distinction in principle, which we believe exists between that case and the one here presented, lies in the fact that here the decree already issued by the District Court has fully eradicated the combination by nullifying the license agreements, and there is no evidence of any other form of concerted action. There is no parallel or related course of conduct to be enjoined, similar to a violation established by the evidence in the record.

The unlawful combination found to exist here was the existence of industry-wide license agreements, with price-fixing provisions, entered into with knowledge of adherence of others. Now that these license agreements have been stricken down there is no other or related field of activity into which the injunctive provisions of a decree may suitably reach without violating the legal principle, often enunciated by this Court, that a decree may not be so broad as to enjoin all possible breaches of the law (*Hartford-Empire Co. v. United States*, 323 U. S. 386, 410; *Swift & Co. v. United States*, 196 U. S. 375, 396; *National Labor Relations Board v. Express Pub. Co.*, 312 U. S. 426, 435-6).

Upon the earlier remand of this case to the District Court, and prior to the introduction of any evidence by the defendants, the Government moved for, and obtained summary judgment "on the fundamental question involved" (SR. 144, 102-3). The District Court properly fashioned its decree to be as effective and fair as possible in preventing continued or future violations of the Sherman Act within the undisputed facts of this particular case.

In *Associated Press v. United States*, 326 U. S. 1, 22; another case in which the Government sought to broaden a decree entered upon its motion for summary judgment, this Court said:

"The fashioning of a decree in an Anti-trust case in such way as to prevent future violations and eradicate existing evils, is a matter which rests largely in the discretion of the Court. *United States v. Crescent Amusement Co.*, *supra*. A full exploration of facts is usually necessary in order properly to draw such a decree. In this case the government chose to present its case on the narrow issues which were within the realm of undisputed facts. In the situation thus narrowly presented we are unable to say that the Court's decree should have gone further than it did."

The District Court also followed the precept contained in the decision of this Court in *United States v. National Lead Co.*, 332 U. S. 319, 335:

"The essential consideration is that the remedy shall be as effective and fair as possible in preventing continued or future violations of the Anti-Trust Act in the light of the facts of the particular case."

There is nothing in the record of this case to cause doubt that Celotex, and the other appellees, will conform meticulously to the requirements of the decree entered by the District Court, and observe, as well, the other prohibitions of the Sherman Act. The District Court has retained jurisdiction of this cause to enable the parties hereto to apply to it at any time for such orders, modifications or directions as may be necessary or appropriate for enforcing compliance with the decree (SR. 190).

Should Celotex, or any of the other appellees, attempt "concerted adoption and enforcement of a host of rules designed to restrain price competition and stabilize prices",* as the Government fears, it will then be appropriate for the Government to request the District Court for a proper modification of the decree. (*United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 729 [1944]). In *Associated Press v. United States*, 326 U. S. 1, 22-3, this Court said:

"Furthermore, the District Court retained the cause for such further proceedings as might become necessary. If, as the government apprehends, the decree in its present form should not prove adequate to prevent further discriminatory trade restraints against non-member newspapers, the Court's retention of the cause will enable it to take the necessary measures to cause the decree to be fully and faithfully carried out."

CONCLUSION.

The decree of the District Court is fully adequate to eradicate completely the combination which has been found to exist, and all of its effects. There is no need, or justification, for going further and imposing upon this licensee more onerous and restrictive injunctions, since to do so would only hamper, rather than encourage, effective competition in the gypsum board industry. The decree of the District Court should not be changed.

Respectfully submitted,

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October, 1950.

* Government Brief. p. 28.

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CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1950

No. 30

THE UNITED STATES OF AMERICA,

Appellant,

vs.

UNITED STATES GYPSUM COMPANY, SEWELL
L. AVERY, OLIVER M. KNODE, *et al.*,

Appellees.

**BRIEF FOR APPELLEES NATIONAL GYPSUM COM-
PANY, EBSARY GYPSUM COMPANY, INC., and
SAMUEL M. GLOYD, doing business under the name
of TEXAS CEMENT PLASTER COMPANY**

October 11, 1950

IN THE
Supreme Court of the United States

OCTOBER TERM, 1950

THE UNITED STATES OF AMERICA,
Appellant;

vs.

UNITED STATES GYPSUM COMPANY,
SEWELL L. AVERY, OLIVER M.
KNODE, *et al.*,

Appellees.

No. 30

**BRIEF FOR APPELLEES NATIONAL GYPSUM COM-
PANY, EBSARY GYPSUM COMPANY, INC., and
SAMUEL M. GLOYD, doing business under the name
of TEXAS CEMENT PLASTER COMPANY**

Statement

National Gypsum Company, Ebsary Gypsum Company, Inc., and Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company, are three of the appellees on this appeal who are among the companies referred to as "defendant companies" in Article II (1) of the decree of the District Court entered on November 7, 1949 (R. 185-191). Each of them was a licensee of appellee United States Gypsum Company under one or more of the patent licenses referred to in Article II (4) of said decree. The appellees who join in filing this statement respectfully sub-

mit to this Court that the entry of the decree of the District Court above referred to was a proper exercise of the discretion of that court and should not be disturbed by this Court upon this appeal.

Respectfully submitted,

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October 11, 1950

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CHARLES CLARK & SONS

No. 30

In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED STATES GYPSUM COMPANY, ET AL.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**MOTION BY THE UNITED STATES FOR AMENDMENT
OF COURT'S OPINION**

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 30

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED STATES GYPSUM COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION BY THE UNITED STATES FOR AMENDMENT
OF COURT'S OPINION

The United States moves that the Court amend the last paragraph on page 12 of the Court's slip opinion in the above case so as to clarify the holding of the Court with respect to Sections 1 and 2 of Article V of the judgment proposed by the Government. The paragraph in question reads as follows:

(d) The Government asks that the decree forbid standardization of trade practices through concerted agreement. Our former *Gypsum* opinion, pp. 382-83, gives a summary of the methods adopted. Another method of regulating sales was by

special provision for certain classes of customers, jobbers and manufacturing distributors. See 333 U. S. at 397 and 399, n. 18. We think this would justify the Government's requests. Article V, §§ 3, 4 and 6.

Article V of the Government's proposed judgment contained six numbered sections or subparagraphs. The Court (slip opinion, p. 14) approved a revised form of Section 5 of Article V. The Government interprets the paragraph of the Court's opinion quoted above as expressing approval of the substance of the prohibitions embodied in the remaining sections of Article V, namely, Sections 1, 2, 3, 4 and 6. But the fact that Sections 3, 4 and 6 were explicitly approved, while Sections 1 and 2 were not, may lead to time-consuming controversy in the district court as to whether the substance of the prohibitions of Sections 1 and 2 should be included in the judgment, and possible action by the district court contrary to the intent and meaning of this Court's opinion.

It seems clear that the first two sentences of the quoted paragraph refer to Sections 1 and 2 of our proposed Article V. The first sentence aptly describes the subject matter of these sections and the second sentence states that the Court's "former *Gypsum* opinion, pp. 382-83, gives a summary of the methods adopted." The pages of the *Gypsum* opinion to which the Court

referred were those which the Government had cited (Br. p. 40) as showing that the defendants had engaged in these practices. The third sentence of the quoted paragraph describes the practices dealt with in Sections 3 and 4 of our proposed Article V. After a reference to the pages of the former opinion where these practices were discussed, the paragraph concludes: "We think this would justify the Government's requests. Article V; §§ 3, 4 and 6."

If the Government is correct in inferring that the Court intended to give to Sections 1 and 2 the same measure of approval as it gave to Sections 3, 4 and 6, the Court's holding would be clarified by including the two former sections among the sections cited at the end of the paragraph. This would mean changing the final reference to Article V so that it would read: "Article V, §§ 1, 2, 3, 4 and 6."

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

December 1950.

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CHARLES ELMORE BROMLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1950

No. 30

THE UNITED STATES OF AMERICA,

Appellant,

vs.

UNITED STATES GYPSUM COMPANY, et al.,

Appellees.

**MEMORANDUM IN OPPOSITION TO MOTION BY
THE UNITED STATES FOR AMENDMENT OF THIS
COURT'S OPINION**

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December 18, 1950

IN THE
Supreme Court of the United States

OCTOBER TERM, 1950

THE UNITED STATES OF AMERICA,

Appellant,

v.s.

UNITED STATES GYPSUM COMPANY, *et al.*,

Appellees.

No. 30

**MEMORANDUM IN OPPOSITION TO MOTION BY
THE UNITED STATES FOR AMENDMENT OF THIS
COURT'S OPINION**

Appellant's motion seeks to amend the last paragraph on page 12 of the Court's slip opinion in the above-entitled case.

I

In the first place the motion should be stricken as attempting a post-decision procedure not provided for in the rules of this Court. It is in no sense a petition for a rehearing (Rule 33). It improperly presupposes an unwillingness on the part of the District Court to determine the details and form of the injunction in accordance with this Court's general suggestions, notwithstanding the expressed approval of that procedure (Slip Opinion 17).

II

Furthermore, the motion is without merit. It deals solely with appellant's proposed subparagraphs (1) and (2) of Article V. In support of the motion reference is made to freight and delivery charges, sizes and minimum quantities, shipment and credit terms, all with respect to the fixing of the minimum price of patented gypsum board under the license agreements (Appellant's Motion, pp. 2-3). The Court's failure to refer specifically to subparagraphs (1) and (2) of Article V was not the result of inadvertence, as appellant's motion implies, but rather was for very sound reasons after a review of the arguments of both parties (Appellant's Br. pp. 40-41; Appellees' Br.* pp. 43-45).

Appellees pointed out in their brief (p. 42) that the proposals to enjoin such specific practices paralleled similar provisions which appellant submitted to the District Court and which that court rejected. It covered the point, however, in a direct, simple and effective way by enjoining and restraining defendants from the further performance or enforcement of any of the provisions of the patent licenses, including any price bulletin issued thereunder. In this connection appellees urged that the District Court's method of handling the matter was entirely appropriate and should not be disturbed merely because the court did not choose to accept appellant's proposals.

Appellees also pointed out in their brief (p. 42) that the effort to include these specific practices was based upon matters which allegedly were included in the license bulletins

*Reference herein to Appellees' Brief will be to the brief filed on behalf of appellee United States Gypsum Company and certain individual appellees.

issued by licensor in the exercise of its reserved right to fix the minimum price at which the licensees might sell the patented board; that such details were necessary and inherent in the fixing of a price, as was illustrated by reference to the bulletins in the *General Electric* case and the pronouncements of the Bituminous Coal Authority in the coal industry. In this connection appellees called attention to their offers to prove that all provisions of the price bulletins with respect to the terms and conditions of sale had direct relation to the prices fixed by USG, and that such provisions were not promulgated for the purpose or with the effect of regimenting the industry, but solely for the purpose of defining the minimum price fixed by the licensor (Offer of Proof No. 51, R. 157). Appellees argued (Br. p. 43) that when the patent licenses and the price bulletins are stricken down and appellee companies enjoined from enforcing or performing any of the provisions of the licenses or bulletins, they have been effectively restrained and that there was no occasion for any such provisions as suggested by appellant.

Referring specifically to sub-paragraphs (1) and (2) of Article V, appellees, in their brief (p. 43), pointed out that appellant sought to support these provisions by referring to certain language of this Court in describing the method of pricing gypsum board (Appellant's Br. pp. 40-41). It appears very clearly that these matters all had to do only with fixing the price of gypsum board.

Appellees, referring particularly to subparagraphs (1) and (2) of Article V, further urged (Br. p. 44) that these provisions were highly objectionable and improper in that they attempted to place sweeping restrictions upon every activity of appellee companies in the manufacture, sale and

distribution of gypsum board, plaster and miscellaneous gypsum products; that the provisions were so vague and general that the appellee companies could not safely work under them in the ordinary conduct of their respective businesses. In this connection it was pointed out that these companies served the building industry and the methods of production and distribution of their products were largely influenced by the requirements of that industry. This was illustrated by the fact that the sizes of all building materials fastened to walls of buildings normally follow standard measurements in building construction, and that gypsum board must follow the same pattern.

With further reference to subparagraphs (1) and (2), appellees in their brief (p. 44), pointed out that although the provisions are made applicable to other gypsum products, they have reference only to charges limited to gypsum board. In this connection it was pointed out that the complaint specifically charged that appellees had restrained and monopolized the manufacture and distribution of gypsum products by concertedly standardizing gypsum board and its method of production, by limiting the manufacture of board to uniform methods, and by producing only uniform kinds of board for the purpose and with the effect of eliminating competition (Pars. 45(b), 77(a), 93; R. 10, 18-19, 25). It was further stated that there was no charge in the complaint of alleged efforts to standardize plaster and miscellaneous gypsum products (Br. p. 44).

Referring again to said subparagraphs (1) and (2), appellees, in their brief (p. 44), showed that the answers of appellees denied all of these charges (R. 284, 290) and that appellees offered to substantiate their contentions by proving that there was no agreement or understanding that the

production of open-edge board, No. 2 board or seconds would be discontinued; that each appellee was at all times free to make and sell such board; and that the discontinuance of the manufacture of open-edge board was due entirely to economic reasons (Offers of Proof Nos. 54, 55; R. 158).

It was further pointed out by appellees in their brief (p. 45) that on the prior appeal this Court, in considering the trial court's findings of fact as to these charges referred only to the elimination of open-edge board and was apparently largely influenced in its rejection of the findings by the royalty provision contained in the licenses (333 U. S. pp. 396-397). It was shown that appellees, however, offered to prove the economic reasons for those royalty provisions and to establish that they were not included for the purpose or with the effect of eliminating the production of open-edge board or any other type of board (Offer of Proof No. 46, R. 156). It was argued that there was nothing illegal *per se* in measuring royalties for the privilege of using licensor's patents on patent-free products. Appellees, in their brief (p. 45), with respect to the provisions of subparagraphs (1) and (2) of Article V, argued that under the circumstances it would obviously have been improper for the District Court to have attempted on appellant's motion for summary judgment to make an adjudication on its standardization charges and it did not purport to do so; that similarly it would be improper to include injunctive provisions which would be appropriate only if such charges had been proved. It was pointed out that the District Court, recognizing that the questions with respect to such standardization were confined to certain provisions of the license bulletins, took appropriate corrective measures by striking down the license

bulletins and enjoining any further performance or enforcement thereof.

This Court, in its last opinion in this case, in Section I thereof, said that it read the preliminary statement of the District Court to the decree and the summary decree itself as an adjudication of violation of the Sherman Act by the action in concert of the defendants through the fixed price licenses, accepting as true the underlying facts in defendants' proof by proffer. It was also said that the trial judges understood the summary judgment to be limited to that one undisputed question. The Court then said that that conclusion entitled the Government only to relief based on that finding and the proffered facts and that it was on that basis the Court examined the Government's objection to the decree.

We submit that there was no inadvertence, the question raised by appellant on its motion was fully presented by both parties and considered by the Court, and that appellant's motion should be denied.

Respectfully submitted,

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December 18, 1950

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

against

UNITED STATES GYPSUM COMPANY ET AL.

PLAINTIFF'S MEMORANDUM ON
MOTION FOR SUMMARY JUDGMENT

ROSCOE T. STEFFEN;
EDWARD KNUFF,
Special Assistants to
the Attorney General

HERBERT A. BERGSON
Assistant Attorney General

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IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff

v.

UNITED STATES GYPSUM COMPANY, ET AL.,

Defendants.

Civil Action No. 8017

PLAINTIFF'S MEMORANDUM ON MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

The complaint in this action was filed in 1940. It alleges in considerable detail that the defendants are engaged in an illegal combination in the manufacture and sale of gypsum products in violation of Sections 1, 2 and 3 of the Sherman Act.

Trial was begun in November 1943 and the Government rested its case on April 20, 1944. At the conclusion of the Government's case the defendants moved to dismiss under Rule 41(b) of Federal Rules of Civil Procedure. Arguments were concluded on the motion on May 31, 1944.

On June 15, 1946, this Court rendered an opinion holding that the motions should be granted and, on August 5, 1946, filed its findings of fact and conclusions of law and entered judgment dismissing the complaint.

On September 30, 1946, the Government filed its petition for appeal to the Supreme Court of the United States and the petition was allowed the same day.

1947, and on March 8, 1948, the Supreme Court rendered its opinion reversing the judgment of the District Court in granting the motion to dismiss.

On June 8, 1948, at the request of the Government, a conference was held between all attorneys interested in the case and the Judges designated to hear it to see whether or not a program could be adopted to speedily wind up and conclude the present action. At that time the Court stated that a motion for summary judgment would be entertained and requested the Government to file such a motion. The defendants were also requested to make a proffer of such proof as they thought they had a right to make; in addition, to make such contest as they might desire on the motion for summary judgment. Tr. 7789. The motion and proffer were to be made on or before June 15, 1948, and June 29, 1948, was set as the date for argument on the motion and proffer. Tr. 7797-8.

I

SUMMARY JUDGMENT

Rule 56(a) of the Federal Rules of Civil Procedure, as amended, provides that the plaintiff may, at any time after the expiration of 20 days from the commencement of the action, move for a summary judgment in his favor upon all or any part thereof. Obviously more than 20 days have elapsed since the present action was instituted.

Rule 56(c), as amended, provides that the judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Rule 56(d) provides that if judgment on the motion is not rendered on the whole case, the court, by examining the pleadings and evidence before it and by questioning counsel, shall ascertain what material facts exist without substantial controversy and shall make

an order specifying the facts that appear without substantial controversy; directing such further proceedings as are just; and that the trial shall proceed upon the facts specified as controverted.

In Point II of this memorandum we will consider the pleadings, the evidence, and the admissions and will demonstrate that there is no material issue of fact for this Court to consider further; that the denials in the defendants' answers in reality amount to nothing more than denying the legal effects of admitted facts rather than denying the facts themselves.

Whether or not the plaintiff is entitled to judgment as a matter of law will be discussed in a separate Point.

II

THE FACTS

The material facts are set forth in detail in the complaint and answers; in the testimony of witnesses and exhibits offered at the trial; and also in the admissions of counsel made during the progress of the case. The material facts, as they are set forth in the complaint and answers, will be reviewed only briefly in this memorandum. For the convenience of the Court, a table of admissions appearing in the pleadings is attached hereto as an Appendix.

We do not propose to go into detail concerning the testimony of witnesses or the contents of exhibits and reargue what the meaning or force of the oral testimony is, or the proper construction to be placed on documents; that has already been done in our various memoranda heretofore submitted to the Court on the Motion to Dismiss, in the briefs on the appeal to the Supreme Court, and in the opinion of the Supreme Court on the appeal in this case. We feel very certain that this Court is thoroughly familiar with the testimony and exhibits and does not desire at this time any further particularization of those items. In so far as it is necessary to refer to the

3

facts^{1/} gleaned from the testimony and exhibits, we shall adopt the summary of them as made by the Supreme Court in its opinion of March 8, 1948, on the appeal in this case.^{2/}

Paragraphs 1 to 43

There can be no doubt at all, based upon the admissions contained in the defendants' answers, that there is no disagreement upon the facts as set forth in the first 43 paragraphs of the complaint. That is to say, the description of the defendants and their relative positions in the gypsum industry are substantially correct; they all conduct a trade in gypsum products in interstate commerce; all (the defendants contend that two do not) conduct a commerce in such products between a state and the District of Columbia; and that the defendants are all the manufacturers of board in the United States in the so-called Eastern area. It is further agreed that gypsum, a raw product, is mined by all the defendant companies in various sections of the country and is sold by them in several forms, but principally as plaster, tile, and gypsum board; and finally, that the distribution of such products, principally by sale to dealers and to plaster manufacturers, is described in the complaint with substantial accuracy. However, paragraph 43, relating to jobbers, is not fully accepted. Since the subject of jobbers will be discussed later in this memorandum, our discussion on that issue will be deferred until that subject is reached.

^{1/} It will be recalled that this Court, in speaking about the facts of this case said that the basic or subsidiary facts are largely not in dispute. "The conflicting contentions of the parties on the issue of fact in the case are not as to what the evidence is, or as to what are the basic facts shown by the evidence; the dispute is as to the inferences to be drawn from the basic facts and, therefore, as to what the ultimate facts are." United States v. United States Gypsum Co., 67 F. Supp. 397, 459, 451.

^{2/} Where "Slip opinion p. _____" is cited in this memorandum the reference will be to the Slip opinion in the case of United States v. United States Gypsum Co. et al., Supreme Court of the United States, No. 13 Oct. Term 1947, decided March 8, 1948.

4

Paragraphs 44 to 46a

For the present, we shall defer discussing the allegations contained in the paragraphs listed above. For the most part, all the allegations of these paragraphs are conclusions drawn from facts which are contained in other paragraphs of the complaint, particularly paragraphs 90 to 104 and 108 to 111. We prefer to develop all facts chronologically before any attempt is made to discuss the conclusions which we draw from them.

Paragraphs 48 to 54, Inclusive

Paragraphs 48 to 54 of the complaint relate to the early patent litigation in the industry. There is no dispute between the parties with respect to the material facts alleged in these paragraphs, as the answers indicate, although USG does deny the conclusion we drew in paragraph 54 concerning a comprehensive plan for stabilizing prices in the gypsum industry. The Supreme Court's treatment of this branch of the case appears at page 4 to 6 of the Slip opinion; there that Court traces briefly the development of modern gypsum board and goes briefly into early patent infringement litigation between USG and other members of the board industry.

Paragraphs 55 to 63, Inclusive

The above paragraphs of the complaint have to do with the early license negotiations between Blagden and Avery and the activities of Griswold. It is a fair statement to say that, in the main, there is no dispute between the parties concerning the allegations of material facts appearing in these paragraphs.^{3/} The Supreme Court summarized

^{3/} In paragraph 55 of the complaint we allege that conferences were held between Avery, Blagden and Griswold to consider compromises of patent litigation. We then state that the conclusions reached by the parties are set forth in paragraphs 56 to 58 of the complaint. In the answers these "conclusions" are denied. It is submitted that whether or not we drew the correct conclusions is immaterial; the material fact is whether or not: (a) conferences were held, and (b) were price-fixing patent licenses discussed. As to these, there can be no doubt at all. See Tr. 781-782.

the evidence relating to these paragraphs as follows:

Although the industry-wide network of patent licenses was not achieved until 1929, the government claims that the documentary exhibits show that the process of formulation of the plan began in 1925. On December 12, 1925, Augustus S. Blagden, president of Beaver, sent a memorandum to Sewell Avery, president of United States Gypsum. Beaver had been adjudged an infringer of the Utzman patent, and Blagden and Avery had negotiated terms for settling the suit. Blagden testified that Avery had offered to settle with Beaver by granting Beaver a license with a price-fixing limitation and provision that Beaver should pay damages for past infringement and acknowledge the validity of United States Gypsum's patents. In the memorandum Blagden analyzed in detail the consequences that would flow from five possible decisions of the Circuit Court of Appeals if the decree adjudging Beaver an infringer were appealed. Blagden noted that whether the court upheld or denied United States Gypsum's claim, United States Gypsum "would lose, perhaps irrevocably, its present opportunity to organize the industry and stabilize prices." The memorandum further pointed out that if the suit were settled on the terms offered by Avery, the result would be more favorable to United States Gypsum than any possible decision by the Court of Appeals. Beaver would accept a license and "would agree to use its best endeavors" to induce other manufacturers to accept similar licenses; if Beaver were successful in persuading other manufacturers to execute licenses, United States Gypsum could "maintain a lawful price control and avoid the necessity of a reduction by plaintiff [United States Gypsum] of current prices to meet competition." Under such circumstances, United States Gypsum "would be able to take a dominating position in the industry with an opportunity to control or at least to participate in the control of prices through legitimate means of patent licenses."

Although there is no proof that Avery approved Blagden's memorandum, Blagden did accept a license on the terms offered by Avery in July, 1926, and Blagden testified that he talked to a number of representatives from other companies and urged them to accept licenses from United States Gypsum. Frank J. Griswold, general manager of American Gypsum Company, also was active in promoting a scheme of industry-wide licensing. On May 12, 1926, Griswold wrote a letter to the president of American, stating that he had talked to Blagden, and added that "This matter will be discussed by all independent wall board manufacturers at a meeting in Chicago next Wednesday afternoon." Griswold concluded the letter with the statement: "According to the plans we have we figure that there is a possibility of us holding the price steady on wallboard for the next fourteen or fifteen years which means much to the industry."

Blagden and Griswold did not succeed in persuading other manufacturers to accept licenses in 1926. Universal accepted a license in September, 1926, but there is no evidence that Blagden and Griswold played any part in negotiating the settlement. [Slip opinion 6-8.]

Paragraphs 64 to 77, Inclusive

The above paragraphs set forth in detail the facts surrounding negotiations for licenses during the period from July 1927 to and including the May 1929 meeting. There is no disagreement between the parties as to the material facts alleged, although it is fair to state that there is some disagreement between the parties on some immaterial facts^{4/} as well as to the conclusions the government drew from the facts. The Supreme Court reviewed the evidence relating to these paragraphs and summarized the facts as follows:

Griswold suggested to Avery that United States Gypsum offer a shorter term license, but Avery was unwilling to make such a concession. During 1927 Griswold and Blagden continued their negotiations. Griswold and Samuel M. Gloyd, owner of the Texas Cement Plaster Co., corresponded with each other in regard to the licensing proposal. When Griswold informed Gloyd that Atlantic Gypsum Co. had signed a long-term license with United States Gypsum, Gloyd replied that he would apply for a license right away. Previously Gloyd had been trying to secure a shorter term license. Gloyd and Atlantic both signed licenses similar to the original license granted to Beaver.

In January 1928 Certain-teed Products Corp. purchased the assets of Beaver. Certain-teed had previously been making open-edge board and selling it at lower prices than the closed-edge board manufactured by United States Gypsum and its licensees. Certain-teed refused to accept the license agreement of Beaver and United States Gypsum filed suit to compel Certain-teed to accept the license. Certain-teed posted a million dollar bond and commenced to make open-edge board at all Beaver plants. George M. Brown, president of Certain-teed, and Avery had several conferences at which they attempted to compose their differences, but without result. The government introduced in evidence a memorandum written by

^{4/} For instance, USC in paragraph 59 of its answer denies that the competition in 1928 caused a renewal of interest of board manufacturers in price stabilization; denies that Avery urged companies not licensees to reconsider his proposal for an industry-wide plan. These facts, if true, are immaterial; it would make no difference in result whether Avery urged the members of the industry to take out licenses or they urged Avery to grant them.

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Brown, dated March 1, 1928, in which Brown expressed confidence that he could make open-edge board and sell it in competition with United States Gypsum, and that he was afraid to sign up a license with price-fixing provisions because his competitors would grant secret rebates. Brown concluded that Certain-teed should answer the suit of United States Gypsum to enforce the Beaver license by claiming that the suit was filed not in the interest of royalties but for the sole purpose of trade domination and monopoly and price control. Brown concluded with the statement that United States Gypsum's "determination to gather in a monopoly, if possible, leads them to risk everything for such domination because of the big rewards possible, if they can succeed." Certain-teed did file an answer to the suit couched in those terms. Griswold testified that in a conversation with Brown in the following month Brown stated that he might possibly consider taking out a license if "all of the other manufacturers, or certain ones of them" took out a license. Griswold also wrote the president of American that he had had a conference with Brown at which Brown had said that "they were willing at that time to enter into a license agreement without any particular changes in it providing all of the manufacturers, including Ebsary, would enter into it and make it one hundred per cent."

No settlement was reached between United States Gypsum and Certain-teed in 1928, and no other license agreements were signed. A meeting of representatives of the principal non-licensee manufacturers took place in October, and in November the board of directors of National adopted a resolution authorizing the officials of the company to enter into a license agreement. Besides Certain-teed and National, American, Ebsary, Niagara, and Kelley Plasterboard Company manufactured gypsum board but did not hold licenses from United States Gypsum.

The patent licenses in force at the beginning of 1929 provided that United States Gypsum could fix prices only during the term of the principal Utzman patent, which was scheduled to expire on August 6, 1929, although the remaining features of the agreements were to remain in force until the expiration of the last patent included under the license, which was in 1937. In negotiations in 1929, various defendants expressed concern over the possibility of an effective plan of price fixing in view of the imminent expiration of the Utzman patent. In a letter dated January 9, J. F. Haggerty, president of National, wrote Eugene Holland, president of Universal, asking his views as to possibility of continuing price control after the expiration of the Utzman patent. Holland in reply wrote as follows:

"You will remember that Mr. Avery made it very clear to us that if this plan could not be worked out on the Utzman patent that there were other patents available and we were all agreed that the fact that the

Utzman patent expires next August is not a practical reason for continuing the conflict."

Holland also stated: "I am quite sure that Mr. Avery would not be interested in negotiating settlements unless everyone involved was included." In point of fact, Holland's interpretation of Avery's views was incorrect; several months later licenses were granted to four unlicensed manufacturers but not to American or Kelley. Other exhibits suggest that the prospective licensees were interested in accepting licenses at the same time. In his letter of January 9, Haggerty wrote as follows:

"The question now in my mind is whether or not the other four board makers, who are outside the license agreement, feel that it would be advantageous to go in without the American Gypsum Company. It would seem to me that the chief value in a meeting would be to discuss that point."

On May 14, 1929, the board of directors of National held a meeting "for the purpose of discussing the license agreement submitted to all the manufacturers of gypsum products in the United States east of the Rocky Mountains by the United States Gypsum Co." The minutes of the meeting further quoted the chairman as saying that "he had been definitely informed that all other manufacturers of gypsum products east of the Rocky Mountains, except the American Gypsum Company, had agreed to sign the license contract in substantially the form as submitted to this Board." The board of directors authorized the execution of the proposed license contract.

Two days later National signed the license agreement. On the following day National sent a telegram to Avery as follows:

"Our contract signed and in mail Reeb [of Niagara] ready Stop We are working with Ebsary with hope of everybody being set by Saturday to justify your calling meeting all board makers Monday if you like."

On May 18 Avery dispatched identical telegrams to United States Gypsum's licensees, and to Certain-teed and Ebsary, as follows:

"Mr. Kling [of American] has sent in a contract with material changes and declares he will not attend meeting unless these changes are accepted by us Stop We cannot accept them and regret that the Tuesday meeting will be futile unless other companies wish to proceed as outlined without American license."

On May 20 Avery wrote Gloyd of Texas Cement Plaster, a licensee since 1927, stating that although American was unwilling to accept a license, officers of Certain-teed, Niagara, Ebsary, and National had expressed themselves favorably "to this adjustment" and "it is not improbable that the matter may be closed at the meeting tomorrow or soon thereafter."

On the following day, a meeting of representatives of all but one of the licensed manufacturers, and all unlicensed manufacturers except American and Kelley, took place in Chicago. The three unlicensed manufacturers who were present--Certain-teed, Ebsary and Niagara--signed license agreements. [Slip opinion 8-12.]

Paragraphs 78 to 89, Inclusive

Under the so-called May 1929 agreements price fixing was to end with the expiration of the Utzman patent on August 6, 1929. It will be recalled that on the last day of the May 1929 meeting at the Palmer House, Chicago, Avery told those there assembled that USG had secured the American rights for the Bayer application for a patent on a process to make a "bubble-board." Roos, of USG, also had an application pending for a similar process. Avery, according to Lenci, explained that the inventions related to a light-weight board made by the introduction of soap foam in the slurry. Tr. 4160-4162. At this meeting, Avery made the further proposition that the industry take out licenses under the Roos and Bayer applications. Tr. 5029. The paragraphs listed above all relate to the transactions which took place on the last day of the May 1929 meeting until the industry was licensed under the November 1929 licenses.

It is fair to state that there is no disagreement on the material facts as alleged in the foregoing paragraphs except that there is some dispute, not material to a determination of the issues here involved, concerning the scope and use of certain patents.

The evidence on this branch of the case was reviewed by the Supreme Court and that Court summarized the evidence as follows:

At the same meeting, Avery explained to the licensees that United States Gypsum had acquired applications for a patent covering so-called "bubble board" and suggested that the licensees take out licenses under these applications. The applications covered a process for making gypsum board by introducing a soap foam in the gypsum slurry which would result in a lighter and cheaper board. Avery subsequently mailed proposed license agreements under the "bubble board" applications to the licensees. George M. Brown of Certain-teed, on June 4th acknowledged receipt of the license proposal in a non-committal reply, but composed a memorandum for his own files in which he commented that the savings resulting from taking a license would be doubtful, and then added:

"They would have a price control of our business, which might be to our advantage and might be

to our disadvantage in future. They should be just as anxious to have us use this as we should be to get it if there are to be the benefits that they anticipate in stabilizing the whole industry by making a uniform product and get away from the fierce warfares between different products like we have recently had. The saving is too slight to cause us very great worry even if never permitted to use it and the door will certainly be open later for its use if it has the merit that they believe it has. Under a contract sufficiently liberal, we should proceed at once."

On June 6th the licensees met again in Chicago to discuss the question of accepting a license under the "bubble board" patents. Shortly thereafter Certain-teed agreed to take out a license. National also agreed to accept a license; the minutes of the meeting of the board of directors on July 23 read in part as follows:

"The President stated that the United States Gypsum Company has been working on a plan to stabilize the Gypsum Industry and has offered to license the entire Industry under the new method of manufacturing gypsum wallboard known as the 'Bubble System.' The license agreements submitted to each of the wallboard manufacturers contain price fixing clauses and under the agreements submitted the prices of wallboard would be fixed for the whole industry for the term of approximately seventeen years."

The board passed a resolution authorizing the executive committee to negotiate a license agreement, "provided that the United States Gypsum Company, by virtue of this agreement with this Corporation and with other manufacturers of gypsum wallboard, shall control the price of wallboard sold in the United States and its possessions."

Two days later another conference of licensees was held in Chicago. C. O. Brown, vice-president of Certain-teed, prepared a memorandum for George M. Brown, president of Certain-teed, describing what happened at that meeting. According to the memorandum, National and Universal were unwilling to accept "bubble board" licenses until they had settled their litigation over National's infringement of Universal's starch patent. That patent included process and product claims on wallboard made with starch. Brown noted that United States Gypsum was working on a proposal to combine the starch and "bubble board" processes; although such a combination would have technological advantages, Brown commented on the fact that the starch patent had already been issued "so a combination of the two systems would give a patent to work under in the manufacture and sale of Gypsum Wallboard immediately, whereas under only the Bubble process there would be an interim between August 6th and the date of issuance of the Bubble Patent where there would be

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no Patent control. There is, of course, considerable benefit to having Patent control continue without a break." Brown further noted that Avery was trying to work out a proposition with Holland to buy the starch patent or to license the industry under both processes.

Another meeting of licensees was held in Chicago on August 6, the day on which the Utzman patent expired. In a memorandum summarizing what happened at the meeting, C. O. Brown said that it had been agreed that Universal would assign the starch patent to United States Gypsum, and the latter company would issue a single license contract covering all patents and patent applications. Brown further reported that "all of the Independent Gypsum Companies are willing to sign on this basis" and that "The attorneys feel that such a contract would be exceptionally strong and price control could be maintained for the life of the Contract without difficulty." On August 27 the board of directors of National held a meeting at which the president was authorized to sign a license with United States Gypsum covering the "bubble board" and starch patents "provided that all the present licensees of the United States Gypsum Company enter into a similar license and provided further that in the judgment of the President such action will result in legal stabilization of the markets."

Soon thereafter, National, Certain-teed, Ebsary, Niagara and Atlantic executed licenses with United States Gypsum to become effective on the date when Universal's receiver transferred the starch patents to United States Gypsum. On November 5 the starch patents were assigned to United States Gypsum, and on the same date Universal also accepted a license. On November 25 American settled its litigation with United States Gypsum and accepted a license. All manufacturers of gypsum board were now licensed by United States Gypsum, except Kelley Plasterboard Co., and that concern executed a license in April of the following year. Texas Cement Plaster, a licensee under the Utzman patent, did not accept a license under the starch and "bubble board" patents until 1937 when the original license expired. Texas was thus free to sell board at any price from 1929 to 1937.

The contracts which became effective in November 1929 were in substantially identical terms. The license with Universal contained preferential royalty terms which were granted as consideration for the transfer of the starch patents; every other license (except that of Texas) provided that if the licensor should subsequently grant more favorable terms to any licensee (except Universal), the same more favorable terms would be granted to the first licensee. Each licensee agreed to pay as royalty a stipulated percentage on the selling price of "all plasterboard and gypsum wallboard of every kind" whether or not made by patented processes or embodying product claims. The contract covered fifty patents and seven patent applications, including the starch patent and the

"bubble board" applications; the contract was to run until the most junior patent expired. As two "bubble board" patents were issued in 1937, the licenses ran until 1954. The licensees agreed not to sell patented wallboard to manufacturing distributors unless United States Gypsum gave its consent as to each prospective purchaser. As in the previous contracts, United States Gypsum reserved the right to fix the minimum price at which each licensee sold wallboard embodying the licensor's patents, the licensor agreeing that such minimum price would be not greater than the price at which the licensor itself offered to sell. The more important provisions of the license to this litigation are set forth in an appendix to this opinion. Nothing has been omitted that appears to be significant on the issues considered. [Slip opinion 12-16.]

Paragraphs 113 to 120

The above paragraphs relate to the so-called metallized board and perforated lath agreements. Like the May and November 1929 agreements, these agreements also contained price-fixing clauses and prices have been fixed by USG under these agreements, and the answers of the defendants so admit.^{5/} Unlike the May and November 1929 licenses, the entire industry did not accept licenses under these agreements. We do not detail the evidence relating to these issues because, like the issue under the topic "manufacturing distributors," to be discussed later, we feel that they are "not necessary for a decision" on the present motion. As a matter of precaution, however, we would want it understood that they are not abandoned. We feel that these issues can be satisfactorily taken care of in the final judgment.

Paragraphs 44 to 46a

Up to this point we have dealt with the occurrences and events of this case chronologically. We are now in a position to discuss those paragraphs of the complaint that draw conclusions from those facts.^{5a/}

^{5/} See defendants' answer to paragraphs 90-92 of the complaint.

^{5a/} This statement is not unqualifiedly correct. For instance, we discuss briefly in this portion of the memorandum paragraph 46a of the complaint although this paragraph is not a conclusion in any sense.

Paragraph 44 is the charging paragraph of the complaint; that is to say, that paragraph, substantially in the words of the statute, charges the defendants with violating Sections 1, 2 and 3 of the Sherman Act.

Paragraph 45 alleges that the defendants entered into and have carried out the combination and conspiracy for the purpose and effect of restraining, dominating and controlling the manufacture and distribution of gypsum board in the Eastern area. In substance, this paragraph generalizes what is elsewhere spelled out more fully in other paragraphs^{6/} and states that the defendants:

- (a) Concertedly raised and fixed at non-competitive levels the price of gypsum board manufactured by them.^{7/}
- (b) Concertedly standardized gypsum board and its method of production.
- (c) Concertedly raised and stabilized the prices of plaster and miscellaneous gypsum products.
- (d) Concertedly eliminated substantially all jobbers of gypsum products.
- (e) Concertedly coerced manufacturing distributors to resell at fixed prices.

Paragraph 46, in substance, states that the combination has been carried out, in part, by the use of patent license agreements and that these agreements are not proper patent license agreements reasonably designed to secure pecuniary reward for the monopoly but were for the illegal purposes described in paragraphs 44 and 45.

^{6/} See paragraphs 90-104 and 108-111 and the answers thereto. All of the foregoing paragraphs and answers are discussed later in this section except paragraphs 97 to 103, inclusive. Paragraph 97 relates to price fixing on open-edge board; the last two sentences in paragraph 98, as well as paragraphs 99 to 102, inclusive, relate to the fact that all or certain licensees did not use certain patents in the manufacture of board. The answers of the defendants deny these allegations. It is submitted that the issue raised by the answers is not material.

^{7/} In the answers to paragraphs 90-92 it is admitted that USG fixed prices on board and enforced the price bulletins.

metallized and perforated lath patents are not valid. *

In their answers the defendants deny the allegations of paragraphs 44 and 45; deny the allegations of paragraph 46 and "answer-in further," in substance, aver that they had the right to fix prices under the doctrine of the General Electric case^{8/} (272 U. S. 476).

Under paragraph 46a this Court held that the government could not attack the validity of the patents in the present proceeding and dismissed certain portions of paragraph 46a of the complaint. On appeal this Court was reversed as to this point. Slip opinion 21. No answers have yet been filed to certain portions of this paragraph and consequently as to such matters issue has not yet been joined.^{8a/}

Concerning (a) above--control of prices. All the patent license agreements here involved were substantially identical and, without exception, all provided for price control on board by USG. In his opening statement, counsel for USG stated:

We don't take the position that we didn't fix prices. Of course we did, we fixed prices of our competitors. [Tr. 783.]

Concerning price fixing on board, the Supreme Court said in its opinion:

The defendants did undertake to control prices and distribution in gypsum board. [Slip opinion 34.]

Concerning (b) above--standardization.^{9/} The Supreme Court's opinion summarized the evidence relating to standardization of board.

^{8/} This statement is not unqualifiedly correct since all defendants did not affirmatively so plead.

^{8a/} For the purpose of this motion for summary judgment, of course, the Government does not press its claim of patent invalidity. If, however, this motion is denied, and it is decided that defense evidence will be heard, we reserve the right to introduce evidence as to invalidity.

^{9/} See also paragraph 93 of the complaint and the answers thereto. The answers denied any agreement to standardize the product.

The government introduced evidence tending to show that the price of first quality wallboard was raised, that United States Gypsum standardized the type of board sold by requiring its licensees to sell No. 2 wallboard and seconds at the same price as standard wallboard, and standardized the methods of sale so that no licensee could offer more favorable terms to a customer than any other licensee.

* * * * *

It is undisputed that after 1929 the defendants ceased to manufacture open-edge board; the government claims that production of the unpatented board was discontinued in order to protect the patented board from competition. Prior to 1929 open-edge board had sold at lower prices than closed-edge board, and the government's exhibits show that the officers of the corporate defendants realized that there could be no effective stabilization of prices on closed-edge board as long as open-edge board was sold without price control. The license agreements provided that royalties should be paid on the sales of all board sold, patented or unpatented, a provision which would tend to discourage the production of higher cost unpatented board. Although the government produced no evidence of any agreement between the defendants to eliminate production of open-edge board, corporate officers of the licensees testified that they anticipated that one result of industry-wide licensing would be the elimination of open-edge board. [Slip opinion 16, 19.]

When the Supreme Court discussed the findings of this Court relating to the question of standardization, it said:

In Findings 54, 56, 62, 63, 64, 65, 66, 89 and 90; the trial court made findings adverse to the government's claim that the defendants conspired to eliminate the production of open-edge board.¹⁵ The tenor of those findings is that there was no agreement among the licensees to discontinue the production of open-edge board, although the trial court conceded that it might be "inferred" that each licensee did not expect to continue the manufacture of open-edge board. The provision in the license contracts that royalties should be paid on the production of unpatented board is strongly indicative of an agreement not to manufacture unpatented board, and the testimony of the witnesses is ample to show that there was an understanding, if not a formal agreement, that only patented board would be sold. Such an arrangement in purpose and effect increased the area of the patent monopoly and is invalid. [Slip opinion 30, 31.]

Supreme Court also reviewed in some detail the Government's evidence relating to the stabilization of plaster and other gypsum products.

That Court summarized the evidence as follows:

To support the charge of stabilizing the price of unpatented plaster, the government cited letters written by officers of the corporate defendants showing that they anticipated that price stabilization in patented board would be accompanied with stabilization of all gypsum products. The trial court found that the price of plaster and miscellaneous gypsum products in fact did increase after 1929. The government charged that plaster prices were stabilized by requiring licensees who sold plaster together with patented board to sell plaster at prevailing prices. Board and plaster were usually sold together and the defendants claim that cutting of prices on plaster, in sales of the two together, operated in effect as a rebate on the price of board, and hence was legally subject to control. The government introduced in evidence a large number of complaints to Board Survey by licensees as to their competitors' failure to maintain prevailing prices on plaster. A bulletin provision forbidding rebates and allowances stated that a sale of board at posted prices would be in violation of the license if the licensee reduced the price of other products, and Board Survey in summarizing violations of bulletin terms revealed through audit of the licensees' books listed "Price concessions on other material in connection with board sales." [Slip opinion 20-21]

In considering this Court's findings relating to the stabilization of plaster prices, the Supreme Court said:

In Findings 73, 94-97,¹⁷ the trial court dealt with the government's charge that the defendants had stabilized the price of unpatented gypsum products. Those findings held that there was no understanding or agreement that prices would be raised or fixed upon plaster or any unpatented product, that the bulletin provision prohibiting the reduction of price on unpatented products was designed to protect the price of patented board, and was not used to stabilize the price of unpatented materials. We reject all these findings as clearly erroneous. The bulletin provision and the complaints by licensees addressed to Board Survey convince us that the

17 (Footnote omitted)

^{10/} See also paragraphs 96, 103 and 104 of the complaint and the answers thereto. The answers denied that plaster prices were fixed.

defendants attempted to stabilize plaster prices, and the fact that plaster prices were stabilized only when plaster was sold in conjunction with board appears to us to be immaterial. [Slip opinion 32-33.]

Concerning (d) above--elimination of jobbers.^{11/} The Supreme Court summarized the evidence relating to the elimination of jobbers and did so in the following language:

The May 1929 licenses required licensees to obtain the consent of the licensor before selling board to manufacturing distributors or to jobbers and a price bulletin issued under those licenses allowed licensees to grant a 10% discount to both classes. The November 1929 licenses, however, eliminated the consent requirement with respect to jobbers, although it was retained with respect to manufacturing distributors.

The jobbers' discount was continued in bulletins issued under the later licenses until August 8, 1930, when United States Gypsum ordered that the discount be eliminated. Although jobbers could still buy board if they so desired, jobbers could remain in business only by selling to dealers at an advance over the bulletin prices. The court below found that some jobbers were able to remain in business by selling board in odd lots to dealers who did not wish to buy the minimum lot required in the price bulletins. The government points to the definition of "jobber" in the license agreements as "those who do not manufacture but buy and sell plasterboard or gypsum wallboard in straight cars or in mixed cars with other building material and who do not sell at retail," and points to uncontradicted testimony that jobbers as so defined were eliminated. [Slip opinion 19-20.]

When the Supreme Court came to pass upon the correctness of this Court's findings relating to jobbers, it did so as follows:

In Findings 75-79; 99-102,¹⁶ the trial court considered the problem of jobbers. Those findings state, in effect, that the license agreements were not executed with the intent of eliminating jobbers, that the discontinuance of the jobbers' discount was an exercise by United States Gypsum of its right to establish a price for a patented product, and that complaints by licensees that other licensees had sold to jobbers at a discount did not establish concerted action to eliminate jobbers. We are un-

16 (Footnote omitted)

^{11/} See also paragraphs 94 and 95 of the complaint and the answers thereto. The answers deny that jobbers were eliminated as the result of any agreement.

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dants entered into a common scheme to stabilize the industry, and since the elimination of jobbers was undertaken by United States Gypsum in furtherance of that purpose, a finding of specific intent as to each licensee is not necessary. Nor do we agree that the elimination of jobbers falls within the protection of the patent grant when the purpose, as here, is to prevent competition by uncontrolled resale prices. The inference we draw from the uncontradicted evidence is that the defendants acted in concert to eliminate an important class of jobbers. [Slip opinion 31-32.]

Concerning (c) above--manufacturing distributors.^{12/} The Supreme

Court did not stop to set forth the evidence concerning the charge that the defendants fixed the resale prices of manufacturing distributors. On this branch of the case that Court said:

We do not stop to set forth the evidence upon which the government relied to support its charge that the defendants fixed prices at which manufacturing distributors sold gypsum board which they had purchased from United States Gypsum or its licensees, as that issue is not necessary for a decision of the case. [Slip opinion 20.]

While the Supreme Court did not say that the findings of this Court on the issue of fixing the resale price of manufacturing distributors were clearly erroneous, that Court did say:

The trial court made many other findings to which the government objected and yet to determine here whether each is erroneous is unnecessary.¹⁸ Perhaps looked at in isolation some of the government's charges are not proven with that fullness that would justify our reversal of the finding of the District Court on the point. It may be that in the light of this opinion the District Court will conclude that many such findings are no longer significant in reaching its decision. As to others a different result will be required. Enough has been said as to the findings and the evidence, we think, to enable the District Court to pass upon the facts that may come before it on further proceedings in accord with our present ruling. [Slip opinion 33.]

18 (Footnote omitted)

^{12/} See also paragraphs 108 to 111, inclusive of the complaint and the answers thereto. The answers denied that the resale prices of manufacturing distributors were fixed.

necessary for a decision of the case" we will not review here the evidence on it. That issue is not abandoned; it is a minor but not an unimportant issue in the case that can also satisfactorily be taken care of in the final judgment.

As heretofore indicated, the complaint alleges, in substance, that the defendants are and have been engaged in a continuing combination and conspiracy to organize the gypsum industry and stabilize prices by the use of numerous license agreements relating to patents owned by USG. The Supreme Court, in weighing the evidence upon this issue, reaffirmed its rule that where a prima facie conspiracy has been shown the declarations of one conspirator become binding upon his co-conspirators. [Slip opinion 22, 23.]

The Court there, painstakingly, as its opinion indicates, examined all the evidence in this case and examined it in considerable detail. No less than 20 pages of the Slip opinion are devoted to its summary of the evidence.

In its examination of the evidence on the issue as to whether or not the defendants were parties to a plan to blanket the industry under common price-fixing patent license agreements in order to organize the industry and stabilize prices, the Supreme Court went back to 1925 and step-by-step retraced the events as well as the activities of the principal characters of this case. For instance, the Blagden-Avery conference of 1925 was related; the activities of Griswold were noted; Gloyd's interest was observed; George M. Brown's attitude was noticed; the board manufacturers' meeting in Ebsary's hotel room was taken into account; the minutes of the board of directors of National were considered; the concern expressed by various defendants, "over the possibility of an effective plan of price fixing in view of the imminent expiration of the Utzman patent," was considered; the Haggerty-Holland correspondence was noticed; the telegrams between Baker and Avery as well as between Avery and other

defendants that were sent prior to the May 1929 meeting, were taken into account; the meeting at the Palmer House and Avery's invitation to the industry on the last day of the meeting to accept licenses, did not go unobserved; the licensee meetings during the summer of 1929 when the members of the industry met and traded out the terms of the November 1929 licenses were gone into in minute detail; the form of the license agreements--most favored nation clause, royalty on the selling price of "all plaster board - - - - - of every kind," and the price-fixing clause - - - - - was considered; the pricing of No. 2 board and seconds out of the market was noticed; the voluminous price bulletins and the terms thereof were scrutinized; the industry's acceptance of, "directions for distribution of product as corollary to price control," was noted; the establishment of Board Survey, its activities, and the complaints made to it, were all considered; the discontinuance by all defendants of the manufacture of open-edge and No. 2 board was taken into account; the competitive conditions prior to 1929 were commented upon; the "consent clause" to sell to manufacturing distributors only with the written consent of USG, was taken into account; and finally, the stabilization of plaster prices was noted.

After noting all of the activities which we have briefly summarized above, the Supreme Court said:

The District Court did not accept the foregoing facts as definite evidence of a conspiracy. To us, these facts are proof of a conspiracy. Certainly they are overwhelming evidence of a plan of the licensor and the licensees to fix prices and regulate operations in the gypsum board industry. [Slip opinion 23, 24.] [Emphasis ours.]

When the Supreme Court passed upon the correctness of Finding 118, that "the evidence fails to establish that the defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices," it said:

Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case

rule otherwise than that Finding 118 is clearly erroneous. [Slip opinion 30.]

* * * * *

From what has heretofore been summarized it is apparent that the defendants have violated the Sherman Act just as charged in the complaint. Furthermore, it is apparent that on the basis of the complaint and answers alone there is no genuine issue of fact between the parties as to any material facts, for it is obvious, we submit, that the denials contained in the answers do not deny the facts; instead, the denials deny the legal effects of the facts.^{13/} The Supreme Court decided that the legal effects were such as to violate the Sherman Act. Of course, when the uncontradicted evidence is considered (and parenthetically we add that it never can be contradicted) we have in this case facts which "are overwhelming evidence of a plan of the licensor and the licensees to fix prices and regulate operations in the gypsum board industry." [Slip opinion 23, 24.]

^{13/} Cf. Footnote 1, page 4.

NO GENUINE ISSUE OF FACT REMAINS IN THIS CASE WITH RESPECT TO ANY MATERIAL FACT ESSENTIAL TO MAKE OUT A COMBINATION OR CONSPIRACY IN RESTRAINT OF TRADE AND A MONOPOLY OF TRADE OR COMMERCE UNDER THE SHERMAN ACT AND THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD ACCORDINGLY BE GRANTED.

1. Summary Judgment May Be Granted When no Genuine Issue of Fact Material to the Case is Presented.

Under Rule 56(c), as amended, it is provided that summary judgment shall be granted forthwith if the pleadings, depositions and admissions on file show that there is no genuine issue as to any material fact. The issue must be genuine, not a feigned issue; it must be one on a material fact and not on one that is immaterial; and, although there may be pro forma denials in the pleadings, that circumstance will not defeat the motion if the denial goes to the effect of admitted facts rather than denying the facts themselves, and the effects of the facts are determined to be unlawful. In Miller v. Miller, 122 F. 2d 209, (1941, C. of A.D.C.) the Court of Appeals for the District of Columbia sets forth the purpose of Rule 56 and states the general principles governing its application. Justice Edgerton there said:

The purpose of this rule "is to dispose of cases where there is no genuine issue of fact, even though an issue may be raised by the pleadings." However, "The court is not authorized to try the issue, but is to determine whether an issue is to be tried." "To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force." (Page 212; emphasis ours.)

2. The Supreme Court Has Decided That in Order to Make Out a Violation of the Sherman Act in This Case "It Would be Sufficient to Show That the Defendants, Constituting All Former Competitors in an Entire Industry, Had Acted in Concert to Restrain Commerce in

(a) - The General Electric case has no application to an industry-wide combination.

It is unnecessary to discuss each step by which the Supreme Court, unanimously, reached the above statement of the law of this case. It will be noted, however, that by so holding it completely disposed of the defendants' principal contention throughout the trial. It simply is not true, as the defendants have contended, that since a licensor may under the General Electric case, control the prices of a single licensee, he therefore may issue a plurality of licenses containing price fixing clauses and thus bring an entire industry under price control.

That point was made very clear when the Court goes on to say that its conclusion follows "despite the assumed legality of each separate patent license, for it is familiar doctrine that lawful acts may become unlawful when taken in concert." Slip opinion 35. In other words the gist of the offense is concerted action in restraint of trade and it is wholly immaterial that the various acts of the parties, when viewed alone, are quite lawful. ^{14/} Uniform prices maintained by all erstwhile

^{14/} At the oral argument in the Supreme Court the following colloquy ensued:

"Justice Frankfurter: That raises the question of whether that which is being done singly, being lawfully done, may by being done in combination be and create a different problem.

"Mr. Bromley: Of course, it does.

"Justice Frankfurter: That is this problem.

"Mr. Bromley: That is this problem, except we do not have here a combination which, by agreement, limits the freedom of action of the licensee; because he did not have any freedom of action. He could not sell these goods unless he took a license; he was excluded under the patent.

"Justice Frankfurter: I think that argument proves too much, Mr. Bromley; that does not take account of the Carbide doctrine, does it? Because he is a licensee of a patent, he does not have any freedom to get that patent, and yet it does invalidate a license that says if you take this you must also sell non-patented goods.

"Mr. Bromley: Yes, but does that not go outside -- that little factor go outside the protection of the patent?

(Continued next page)

as those maintained where no patents are involved.

It should next be pointed out that there is no question in this case as to the "motives" or the "good faith" of the defendants. Since the General Electric case, as just shown, does not afford protection to industry-wide patent price control under valid licenses, it is unnecessary to inquire whether in this case the defendants acted in "bad faith," or whether their license agreements were "sham." And, of course, it has always been recognized that the defendants could not by showing their "good faith" be exonerated for conduct otherwise in violation of the Sherman Act. The point was made sufficiently clear in Standard Sanitary Manufacturing Co. v. United States, 226 U. S. 20, 49, where the court said:

The law is its own measure of right and wrong, of what it permits, or forbids, and the judgments of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results. United States v. Trans-Missouri Freight Asso., 116 U. S. 290; Armour Packing Co. v. United States, 209 U. S. 56, 62.

It must further be pointed out that the rewards obtained by the defendants by reason of the price control and industry regulation in this case were not regarded by the Supreme Court as constituting the reward to which a patentee is "normally and reasonably" entitled under doctrine of the General Electric case. Mr. Justice Reed stated the point without any qualification whatever: "The rewards which flow to

(continuation of footnote 14/

"Justice Frankfurter: I am saying that it does. All I was saying is the fact that he could not compel a license of a patent does not give us the answer of the restriction that followed from that absence of freedom until he actually gets the patent.

"Mr. Bromley: Yes, sir. Then, may I approach this in this direction?"

"Justice Frankfurter: I do not think logic, abstract logic, is going to solve this kind of a problem." (Transcript of oral argument, Supreme Court, November 14, 1947, pages 134-135.)

through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly."

Slip opinion 35.

It is submitted that, from this brief consideration of the Supreme Court's opinion, the General Electric case must be said to have no application whatever to the circumstances of this case. In the words of Mr. Justice Reed: "The General Electric case affords no cloak for the course of conduct revealed in the voluminous record in this case." As a matter of fact, in United States v. Line Material Co., 333 U. S. 287, 304, decided on the same day as this case, Mr. Justice Reed's language there indicates plainly a further limitation on the doctrine of the General Electric case for, referring to that case he states:

On that assumption where a conspiracy to restrain trade or an effort to monopolize is not involved, a patentee may license another to make and vend the patented device with a provision that the licensee's sale price shall be fixed. [Emphasis ours.]

Of course, where you have, as in this case, an admittedly industry-wide combination, it can hardly be said that this arrangement can be considered lawful.

And finally, were there any doubt remaining on the truth of this proposition it was set at rest by the action of the Supreme Court in denying the defendants' petition for rehearing. There they argued, as they do here, that a "plurality of licenses, even industry-wide, with price limitation, even under a plan by a patentee and its competitors to accomplish such licensing, is within the rule of the General Electric case." Defendants' Petition for Rehearing, page 15.^{15/}

In denying defendants' petition the Court must be taken as having denied the truth of this argument, as above set forth. The General Electric decision, therefore, has no application to the facts of this case.

^{15/} See also pages 1-9 of the same petition where the same argument is advanced.

all former competitors in the gypsum industry, have acted in concert to restrain trade and monopolize commerce in order to organize the industry and stabilize prices.

It will be comparatively simple to demonstrate that there is no genuine issue of fact on any of the material elements of this case. To begin with, it is admitted that the defendants are all the manufacturers of gypsum board in the United States in the area east of the Rocky Mountains. It is admitted that prior to May 23, 1929, they competed at the price, quality and service level in the sale of board; since then there has been no competition at those levels. Indeed, it is admitted that vigorous competition, described as a "price war," existed in the industry until May 1929. It is further admitted that on or about May 23, 1929, the entire industry (except American and Kelley) had taken out patent licenses from USG; that these licenses were substantially identical and all provided for price control; and that USG in fact issued price bulletins at this time which in the main were followed by both licensor and licensees. Indeed, counsel for USG in his opening statement, said (Tr. 783): "We don't take the position that we didn't fix prices. Of course we did, we fixed prices of our competitors."

At the meeting of licensees on May 23, 1929, it is further admitted, Mr. Avery offered to all licensees a license under the "bubble board" patent applications. And, since it is admitted that Mr. Avery at all times insisted upon a price control provision in the USG licenses, it is an admitted fact that these licenses were also understood by all to provide for price control. They in fact were drafted to provide for price control and in November 1929 became effective throughout the entire industry (except for Kelley and Texas). Since that time until July 8, 1941, it is an admitted fact that gypsum board prices have been fixed by USG.

Thus far there can be no question that there is no genuine issue of fact in the case. It would be possible further to show that

gypsum industry which constitute unlawful restraints of trade. For example, there is no question that USG issued the bulletin of August 8, 1930, Government Exhibit No. 430, leveling off the price of board to jobbers with that applying in case of sales to dealers. There is also no question that jobbers, as the term is defined in the November 1929 agreements, have been eliminated from the industry. Again there is no question but USG fixed the price of open-edge boards, No. 2 board, and seconds at the same amount as regular Sheetrock and that subsequently open-edge board, No. 2 board, and seconds have been eliminated from the market. Also, there is no real question that the bulletin provisions concerning rebates have operated to stabilize the price of plaster and other unpatented gypsum products sold in conjunction with board. There admittedly has been policing of the licensees by USG and its licensees through Board Survey. These, and many other practices stand in the record admitted, and, being done in concert, constitute traditional violations of the Sherman Act.

For the purposes of the present motion, however, it is not necessary to rely on these traditional violations^{15a/} in order that the plaintiff may have judgment. As the Supreme Court said: "Even in the absence of the specific abuses in this case, which fall within the traditional prohibitions of the Sherman Act, it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices." Slip opinion 35. In other words, it is enough to show that the defendants, being erstwhile competitors, have acted in concert to stabilize prices in an entire industry. This, we submit, has been shown beyond any doubt at all.

^{15a/} It will be understood, of course, that we do not abandon these traditional abuses.

by the Supreme Court herein whether they so acted prior or subsequent to the signing of the licenses.

In their argument before this Court at the conference of June 8, 1948, it was substantially admitted that the defendants, being erstwhile competitors, have fixed prices of gypsum board in the gypsum industry since at least November 1929. The point was made, however, that it was not admitted that the defendants acted in concert in taking out their licenses. Tr. 7762. It was insisted that each licensee acted independently and that unless it were an admitted fact that the defendants acted in concert at this time the plaintiff would not be entitled to summary judgment. Tr. 7763.

Of course, as counsel for USG further admitted, the point is one which "draws a very fine line indeed." Tr. 7761. It is submitted that the line does not exist at all. Of course it is true, as the Supreme Court pointed out in the Interstate Circuit case, that in order to show concert of action the defendants must at some time be shown to have acted according to a common plan. As the Court put it (306 U. S. 208, 227): "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." [Emphasis ours.]

It will be noted that in the Interstate Circuit case the Court did not specify that the adherence to the plan must be at any given time. And, in the Masonite case, the lower court found expressly that (316 U. S. 265, 275):

. . . in negotiating and entering into the first agreements, each appellee, other than Masonite, acted independently of the others, negotiated only with Masonite, desired the agreement regardless of the action that might be taken by any of the others, did not require as a condition of its acceptance that Masonite make such an agreement with any of the others, and had no discussions with any of the others.

In dealing with these findings, the Supreme Court said (p. 275):

appellee became aware of the fact that its contract was not an isolated transaction but part of a larger arrangement. But it is clear that, as the arrangement continued, each became familiar with its purpose and scope. Here, as in Interstate Circuit, Inc. v. United States, 306 U. S. 208, 226, "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it." The circumstances surrounding the making of the 1936 agreements and the joinder in 1937 of the two other companies leave no room for doubt that all had an awareness of the general scope and purpose of the undertaking. As this Court stated in the Interstate Circuit case (p. 22): "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . . acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

In the present case there is no question whatever that defendants acted concertedly on and after the licenses were executed to carry out their provisions. For instance, in his opening statement counsel for USG stated that in March 1931, USG called a meeting of licensees to meet with it and at this meeting requested that the licensees cooperate with it in the enforcement of the licenses; and furthermore, that USG created Board Survey as the agency to which a licensee could complain about another licensee's non-compliance. Tr. 739-740. As it was there stated (Tr. 740): "Of course it was policing, of course it was trying to keep the licensees in line, but trying to keep them in line only under the licenses. . . ."

Again, the meeting of October 17, 1932, furnishes one of the clearest illustrations of the defendants acting in concert to carry out the provisions of the licenses. This meeting was attended by all the then existing licensees under the November 1929 licenses, Tr. 4297. Various license violations were discussed, Tr. 4304-4316, and concerning these violations, MacLeish was emphatic that: "if the situation did not improve there were only three things to do: either cancel the licenses; or for USG to institute damage suits against the licensees; or to eliminate the price control feature from the licenses." Tr. 4300.

it is admitted that the licenses were not cancelled; USG did not commence damage suits; and that the price control feature of the licenses was not eliminated. Tr. 4300-4303. There can be no question whatever that from and after this meeting all the licensees were fully advised of the purpose of the licensing plan to fix prices, and gave their adherence to it. Moreover, it is admitted that what took place at this meeting was true for following this testimony the following colloquy ensued, Tr. 4328-4329:

"Justice Stephens: - - - I don't understand that there is any dispute about what he said. Do you dispute the witness' statement, Mr. Bromley, as to what went on at this meeting?

"Mr. Bromley: No, your Honor, I think what he said is substantially true.

"Justice Stephens: You may, I assume, wish to qualify or modify his statements through cross-examination, but there isn't any denial that such a meeting was held.

"Mr. Bromley: No.

"Justice Stephens: Or that Mr. MacLeish was there?

"Mr. Bromley: No, your Honor.

"Justice Stephens: And that he discussed these topics.

"Mr. Bromley: Oh no, there isn't any denial of that."

It is submitted that the meeting of October 17, 1932, is sufficient illustration alone to show that the defendants have acted in concert to fix prices and regulate the gypsum industry. Coupled with the other facts above described it would suffice to make out a case upon which summary judgment could be based. But, in addition, it is submitted that the record also shows conclusively that the defendants were fully advised of the plan to have industry-wide price control even before they signed the November 1929 licenses and that by signing the licenses they gave their adherence to it.

At the meeting of licensees on May 23, 1929, it is admitted that Avery offered to license everyone under the "bubble board" patents. On

the day, previously, it is further admitted, USG passed out its first industry-wide price bulletins. During the summer of 1929 it is admitted that a number of meetings were held between USG and some or all of its licensees at which the "bubble board" patent applications and later the "starch" patents were discussed. Since Mr. Avery insisted throughout on price control in all licenses it would be inconceivable that each licensee was not fully aware of the plan that everyone take out licenses. Of course they each acted independently in determining to go along with the others, but there is no question that they did all go along and that "the necessary consequence" of their action, since it was carried out, was "restraint of interstate commerce."

During the course of the argument before the Supreme Court the Justices were careful to question counsel for the defendants as to what knowledge each licensee had concerning the fact that the entire industry might be licensed. In the course of the discussion the following colloquy took place:

"Justice Reed: What I am interested in knowing is whether the licensee, the middle licensee, with Blagden on one side, and the last licensee on the other, knew of the other licensees?

"Mr. Bromley: I think, all, of course, as they took licenses, knew of the existing licenses.

"Justice Reed: Was there any provision that this was a standard license or were there more favorable terms?

"Mr. Bromley: Yes, sir, there was a most favored nation clause.

"Justice Reed: Do you recall what that is or where that is?

"Mr. Bromley: They can find it in a minute

"Justice Reed: Also, if there is such favored nation clause, each of them must know that it is participating in the general plan.

"Mr. Bromley: Yes, sir; but if the end result is legal how can their knowledge render it illegal in the end result; even with a multiplicity of licenses it is legal, and I do not understand that there is anything in ~~Masonite~~ which is contrary because the agreements in Masonite, contrary to the agreements here, were unlawful. [Transcript of oral argument, Supreme Court, November 14, 1947, pages 132-133: Emphasis ours.]

Concerning the November 1929 licenses the following colloquy ensued:

"Justice Black: What happened after the expiration of the patent?

"Mr. Bromley: After the expiration of the patent Mr. Avery called these licensees together and said, "Now, I have an entirely new development." Before the license expired he called them in and said, "I have an entirely new development, the Roos foam or bubble board invention, I want you to look at it, I offer it to you, you can have it if you want it." [Transcript of oral argument, Supreme Court, November 14, 1947, page 144. Emphasis ours.]

It is against this background that the Supreme Court said:

... We think that the industry-wide license agreements, entered into with knowledge on the part of licensor and licensees of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins, were sufficient to establish a prima facie case of conspiracy. Each licensee, as is shown by the uncontradicted references to the meetings and discussion that were preliminary to the execution of the licenses could not have failed to be aware of the intention of United States Gypsum and the other licensees to make the arrangements for licenses industry wide. The license agreements themselves, on their face, showed this purpose. The licensor was to fix minimum prices binding both on itself and its licensees; the royalty was to be measured by a percentage of the value of all gypsum products, patented or unpatented; the license could not be transferred without the licensor's consent; the licensee opened its books of accounts to the licensor; the licensee was protected against competition with more favorable licenses and there was a cancellation clause for failure to live up to the arrangements. See the Appendix. Furthermore, the bulletins gave directions to the industry as to its prices and methods of operation in unmistakable terms. The District Court did not accept the foregoing facts as definite evidence of a conspiracy. To us, these facts are proof of a conspiracy. Certainly they are overwhelming evidence of a plan of the licensors and licensees to fix prices and regulate operations in the gypsum board industry. [Slip opinion 23-24.]

It is submitted that upon the foregoing facts it must be held that the defendants have acted in concert. It is not essential, of course, that there was any "agreement" ^{16/} to sign licenses. It is

^{16/} The contra of this proposition is the same argument that the defendants advanced before this Court at the conference of June 8, 1948; it is part of the argument the defendants used in their petition
(Continued next page)

enough that each knew of a common plan or course of action the necessary consequences of which would be price control and restraint of trade, and gave their adherence to it.

(d) It is not essential to a Sherman Act case to show that defendants "intended" to accomplish the restraints that were subsequently carried out.

At various times in the course of this case it has been urged by the defendants herein that defendants have not been shown to have "intended" the various restraints of trade which have taken place. It has been repeatedly asserted, for example, the defendants have not been shown to have intended to eliminate "jobbers" when they signed the license agreements. In defendants' proffer of proof, submitted pursuant to this Court's order of June 8, 1948, it is apparent that the chief type of testimony to be offered by them in defense will consist of statements from responsible officials of the defendant companies that they did not "intend" by their actions to impose unreasonable trade restraints or to monopolize the gypsum industry.

The complete answer to this contention is that proof of express intention is not required in Sherman Act cases. Perhaps the best known expression of the rule occurs in Patten v. United States, 226 U. S. 525, where the Court said (p. 543):

Bearing in mind that such was the nature, object and scope of the conspiracy, we regard it as altogether plain that by its necessary operation it would directly and materially impede and burden the due course of trade and commerce among the States and therefore inflict upon the public the injuries which the Anti-trust Act is designed to prevent. See Swift & Co. v. United States, 196 U. S. 375; 396-400; Loewe v. Lawlor, 208 U. S. 274; Standard Oil Co. v. United States, 221 U. S. 1; United States v.

(Continued from preceding page)

for rehearing which the Supreme Court, without opinion, denied. See pages 10-16 of the defendants' petition for rehearing.

American Tobacco Co., 221 U. S. 106. And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 243; United States v. Reading Co., 226 U. S. 324, 370.

An even clearer statement of the rule appears in the recent case of United States v. Griffith, 68 Sup. Ct. Rep. 941, where Mr. Justice Douglas said (p. 944):

It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. United States v. Ratten, 226 U. S. 525, 543; United States v. Masonite Corp., 316 U. S. 265, 275. To require a greater showing would cripple the Act. As stated in United States v. Aluminum Co. of America, 148 F. 2d 416, 432, "no monopolist monopolizes unconscious of what he is doing." Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act.

(e) The Line Material case is not inconsistent with the Gypsum case, but affords a further ground upon which this case may be decided.

Both the Line Material case, 333 U.S. 287, and the Gypsum case, 333 U.S. 364, were decided by the Supreme Court upon the same day. It would be more than strange, therefore, if the first could now be used to overrule or limit the second, as the defendants have attempted to urge. The refusal of the Supreme Court to grant defendants' petition for rehearing, however, completely disposes of that argument. The Line Material case does not give support to defendants' contention that the rule of the General Electric case should be expanded to sanction a "plurality of licenses" with industry-wide price control.

As pointed out above, Mr. Justice Reed stated explicitly (333 U.S. 287 at 304) that the General Electric case now "continues as a precedent" only in the single situation between licensor and licensee, where no charge of conspiracy is made. And this Court's attention is further called to the language of the Supreme Court in the later case of United States v. Paramount Pictures, 333 U.S. ___, 68 Sup. Ct. 915, 923, where such a situation is described as being "wholly academic." In other words, there can be no argument today that the doctrine of the General Electric case applies to industry-wide licensing with price control in the circumstances of this case.

No doubt, therefore, the Supreme Court could have decided the Line Material case on exactly the same ground as it did the Gypsum case. It chose, however, to put its decision upon a different ground. Price control in the Line case was based upon a combination of patents, one being the dominant Lemmon patent held by Southern States Equipment Co., and the other the Schultz patent held by Line Material Co. As the arrangement was carried out Southern licensed Line under the Lemmon patent and authorized it to grant sub-licenses. Then, by a series of licenses as in this case, Line brought the whole drop-out fuse industry under licenses with price control.

In condemning this scheme, Mr. Justice Reed said (at 311):

Nothing in the patent statute specifically gives a right to fix the price at which a licensee may vend the patented article. 35 U.S.C. §§ 40, 47. While the General Electric case holds that a patentee may, under certain conditions, lawfully control the price the licensee of his several patents may charge for the patented device, no case of this Court has construed the patent and anti-monopoly statutes to permit separate owners of separate patents by cross-licenses or other arrangements to fix the prices to be charged by them and their licensees for their respective products. [Emphasis ours.]

The Court then generalized its condemnation as follows:

Where two or more patentees with competitive, non-infringing patents combine them and fix prices on all devices produced under any of the patents, competition is impeded to a greater degree than where a single patentee fixes prices for his licensees. The struggle for profit is less acute. Even when, as here, the devices are not commercially competitive because the subservient patent cannot be practiced without consent of the dominant, the statement holds good. The stimulus to seek competitive inventions is reduced by the mutually advantageous price-fixing arrangement. * * * The merging of the benefits of price fixing under the patents restrains trade in violation of the Sherman Act in the same way as would the fixing of prices between producers of nonpatentable goods. [Emphasis ours.]

Thus, quite apart from the holding in the Gypsum case, two or more competing patents may not be combined for the purpose or with the effect of obtaining price control on the products manufactured under any of the patents. In the present case, it is submitted, that is exactly what the defendants did during the summer of 1929. At that time USG took over the "starch" patents from Universal, combined them with the Roos "foam" applications, and then proceeded to license the industry under both with price control.

Moreover, there is no genuine question of fact involved. It is admitted that USG at the meeting on May 23, 1929, offered to license all of its licensees under the "foam" patent, with price control. It is admitted by defendants that during the summer of 1929 Universal charged USG with infringing the "starch" patents. It is admitted that many meetings were held during the summer between USG and its licensees in order to work out new licenses, always with price control,

since Avery insisted on that from first to last. Finally, it is a fact as appears from the patents themselves that both the Haggerty "starch" patent and the Reos "foam" application had to do with a process for making a "porous" or "cellular" board. They both made a light-weight board having, among other claimed virtues, insulating qualities.

It would seem to follow, without real dispute, therefore, that the "foam" and "starch" patents were "competitive non-infringing" patents, as described by Mr. Justice Reed in the Line Material case. The fact that here it was arranged for USG to buy the "starch" patents, with a license back to Universal, instead of to take a cross-license, is obviously a matter of detail of no significance. Here, as in the Line Material case, there was a "merging of the benefits of price fixing under the patents" and the result is equally contrary to the provisions and purposes of the Sherman Act.

The Line Material case, therefore, not only does not overrule or limit the Gypsum decision of the Supreme Court, but actually affords a separate and independent reason why the General Electric case has no application to the facts of this case.

3. The Defendants Have Achieved a Monopoly of the Gypsum Board Industry in Violation of Section 2 of the Sherman Act.

In addition to being engaged in a continuing conspiracy in violation of Section 1 of the Sherman Act, as just discussed, the defendants have likewise monopolized the manufacture and sale of gypsum board in violation of Section 2 of the Act. It is submitted, moreover, that there exists no genuine issue of fact on any material point, and that, accordingly, the Court should grant the motion for summary judgment.

Since 1929, or for nearly 20 years, it is an admitted fact that the defendants have controlled the sale of substantially all gypsum board manufactured and sold in the area east of the Rocky Mountains. There is no question here, as in United States v. Aluminum Co. of America, 148 F. 2d 416, whether the combination controlled a sufficient

amount of commerce to constitute a monopoly. In fact, as the Supreme Court held in United States v. Yellow Cab Co., 332 U.S. 218, a monopoly may have to do with any "appreciable" part of commerce. Here there admittedly was control not only of all manufacture, but of all distribution.

Nor does the General Electric case or the fact that patents are involved, afford any defense to the charge of monopoly. Control of an entire industry when obtained as here by the abuse of the patent privilege affords the plainest possible illustration of an unlawfully acquired monopoly. In this connection, the Court's attention is called to United States v. Paramount Pictures, 334 U.S. ___, 68 Sup. Ct. 915, where the Court found a monopoly to exist notwithstanding the defense that the defendants were protected by the copyright laws. The Court there said (p. 922):

We start, of course, from the premise that so far as the Sherman Act is concerned, a price-fixing combination is illegal per se. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129; United States v. Masonite Corporation, supra. We recently held in United States v. United States Gypsum Co., 333 U.S. ___, 68 S. Ct. 525, that even patentees could not regiment an entire industry by licenses containing price-fixing agreements. What was said there is adequate to bar defendants, through their horizontal conspiracy, from fixing prices for the exhibition of films in the movie industry. Certainly the rights of the copyright owner are no greater than those of the patentee.

And later, when speaking of the vertical combination between producers and exhibitors, the Court said (p. 923):

We stated in United States v. United States Gypsum Co., supra, at page ___ of 333 U.S., at page 545 of 68 S. Ct., that "The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly." The same is true of the rewards of the copyright owners and their licensees in the present case. For here too the licenses are but a part of the general plan to suppress competition. The case where a distributor fixes admission prices to be charged by a single independent exhibitor, no other licensees or exhibitors being in contemplation, seems to be wholly academic, as the District Court pointed out. It is, therefore, plain that United States v. General Electric


Co., supra, as applied in the patent cases, affords no haven to the defendants in this case. For a copyright may no more be used than a patent to deter competition between rivals in the exploitation of their licenses. See Interstate Circuit v. United States, supra, 306 U.S. at page 230, 59 S. Ct. at page 476, 83 L. Ed. 610.

Again, as discussed supra in the case of conspiracy to restrain trade under Section 1 of the Sherman Act, it is not necessary to show by separate evidence that defendants entertained a "purpose" to create an industry-wide monopoly, either before they embarked upon their activities or at any other time. The same is true of "intent"; men are presumed to intend the natural consequences of their acts, and will not be heard to say the contrary. The Supreme Court in United States v. Paramount Pictures, 334 U.S. ___, 68 S. Ct. 915, at 937, put the matter this way:

... we pointed out in United States v. Griffith, 333 U.S. ___, 68 S. Ct. 941, that "specific intent" is not necessary to establish a "purpose or intent" to create a monopoly but that the requisite "purpose or intent" is present if monopoly results as a necessary consequence of what was done.

In other words, the Sherman Act is directed at substance, i.e., the existing conspiracy or monopoly. The means by which it was brought about may have been lawful; there may be no formal proof of specific intent or purpose; but, if a conspiracy or monopoly exists, that is enough. Moreover, the law is clear as to what constitutes a monopoly. One of the best expressions upon the point is that of Mr. Justice Burton in American Tobacco Co. v. United States, 328 U.S. 781, where he said (p. 811):

A combination may be one in restraint of interstate trade or commerce or to monopolize a part of such trade or commerce in violation of the Sherman Act; although such restraint or monopoly may not have been actually attempted to any harmful extent. See United States v. International Harvester Co., 214 F. 937, id., 274 U.S. 693. The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so.

 United States v. American Tobacco Co., 164 F. 700, 721, remanded for further proceedings, 221 U.S. 106, 188. "It is undoubtedly true . . . that trade and commerce are 'monopolized' within the meaning of the federal statute, when, as a result of efforts to that end, such power is obtained that a few persons acting together can control the prices of a commodity moving in interstate commerce. It is not necessary that the power thus obtained should be exercised. Its existence is sufficient." United States v. Patten, 187 F. 664, 672, reversed on other grounds 226 U.S. 525. Cf. North American Co. v. S.E.C., 327 U.S. 686.

The American Tobacco Co. case was limited to the narrow question whether actual exclusion of competitors is necessary to the crime of monopolization under Section 2 of the Sherman Act. The Supreme Court held in the negative. Of course the present case is very much clearer. For example, not only have the defendants had the "power to raise prices," but it is admitted that for 19 years they have fixed uniform and non-competitive prices, i.e., monopoly prices. The circumstance that USG may in each case have set the price without consultation with its licensees is beside the point. As the Supreme Court said in the Masonite case, 316 U.S. 265, at 276: "Prices are fixed when they are agreed upon."

The record, it is submitted, is equally clear upon the power of the defendants "to exclude competition." In the first place, the Court will remember that in the years 1925-1929, when there was active competition, the gypsum board industry was expanding. From 1929 on, however, the reverse has been true and many companies which were thus active have gone out of business. Niagara, Universal and Atlantic were bought out. Oakfield, a manufacturing distributor and potential board manufacturer, was in effect forced to sell out to National. During the pendency of this present case, Texas has sold its plant to Celotex. These are all steps toward the greater concentration and monopolization of the gypsum business.

With respect to distribution the record of exclusion is entirely clear. Jobbers, as defined by the defendants, have admittedly been eliminated. Manufacturing distributors have been permitted to purchase

board from licensees only with the consent of USG. The "power to exclude" such distributors, whether or not it has been used, or whether USG ever "intended" to use it, is without question. And, finally, it is also an admitted fact that the Cardiff Gypsum Company has been concertedly refused the right to buy gypsum board on the same basis as other plaster manufacturers.

This record of actual exercise of monopoly power, both to fix prices throughout the industry and to regulate the distribution of products to exclude competition is overwhelming proof that defendants have violated Section 2 of the Sherman Act. The Supreme Court put the matter this way (Slip opinion, p. 34):

Patents grant no privilege to their owners of organizing the use of those patents to monopolize an industry through price control, through royalties for the patents drawn from patent-free industry products and through regulation of distribution. Here patents have been put to such uses as to collide with the Sherman Act's protection of the public from evil consequences. United States v. National Lead Co., 332 U.S. 319, 327; Hartford-Empire Co. v. United States, 323 U.S. 386, 406; Standard Oil Co. v. United States, 283 U.S. 163, 170-74; Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20. The defendants did undertake to control prices and distribution in gypsum board. They did utilize an agency, Board Survey, Inc., to make this control effective. Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457, 465. Such facts, together with the other indicia of intent to monopolize the gypsum board industry, hereinbefore detailed as to the agreements, bulletins and declarations, convinces us that the defendants violated the Sherman Act.

There is, we submit, no genuine issue of fact on any of the necessary elements of the charges contained in the complaint. Matters yet in dispute, if any, concern details having to do with the relief requested, and can be resolved at some future hearing before the Court.

CONCLUSION

For the reasons herein specified, it is respectfully submitted that the motion for summary judgment should be granted. It is further respectfully requested that if the motion for summary judgment is not

granted upon the whole case, this Court shall make an order specifying the facts that appear without substantial controversy, and that the trial shall proceed only upon the facts specified as controverted.

June 29, 1948.

Respectfully submitted,

ROSCOE T. STEFFEN,
EDWARD KNUFF,

Special Assistants to the Attorney General.

HERBERT A. BERGSON,
Assistant Attorney General.

Appendix

In the various answers filed by the defendants, admissions are made concerning certain allegations of the complaint. Some of these admissions are listed, viz:

As to Paragraph 2 of the Complaint:

Each defendant (except Newark and Texas) admits that it transacts business in the District of Columbia and is engaged in a continuous course of business in selling and delivering gypsum products, including gypsum board, to dealers with the District of Columbia.

Paragraph 2 of the USG answer, typical of the various answers, states:

... that said United States Gypsum Company is engaged in a continuous course of selling and delivering gypsum products, including gypsum board and plaster, to dealers within the District of Columbia and is engaged in soliciting, through salesmen, orders for gypsum products from dealers within the District of Columbia, and in promoting the sale of said gypsum products in the District of Columbia by advertising in the District of Columbia

As to Paragraph 3 of the Complaint:

USG and Celotex admit that they maintain sales offices within the District of Columbia. The admission of Celotex is as follows:

... admits that it maintains a sales office within the District of Columbia and maintains salesmen for the solicitation of business in said gypsum products as set forth in Paragraph 2 of this answer,
[Paragraph 3 answer of Celotex. Bror G. Dahlberg adopts answer of Celotex.]

As to Paragraphs 5, 6, 7, 8, 9, and 10 of the Complaint:

The defendants named in the above paragraphs admit the averments therein contained. [Answer of USG and National, paragraph 6; answer of Certain-teed and Celotex, paragraphs 5, 6, 7, 8, 9, and 10; answer of Newark, paragraphs 5, 6, and 10; Ebsary answer is silent.]

As to Paragraphs 11, 12, 13, 14, 15, 16, 17, 18, 19 of the Complaint:

USG, Avery, and Knode admit the allegations of Paragraphs 12, 13, and 14. [Paragraphs 7 and 8 of USG answer.]

National and Baker admit the allegations of paragraphs 12 and 15. [Paragraphs 8 and 10 of National answer.]

Certain-teed and Celotex admit the allegation of paragraphs 12, 13, 14, 15, 16 (as corrected), 17, 18, and 19. [See same paragraphs in Certain-teed and Celotex answers.]

Ebsary and Frederick Ebsary admit the allegations of the above paragraphs. [No denial in answer.]

Newark and Frederick Tompkins admit the allegations of paragraphs 12 and 19. [See paragraphs 5 and 6 of Newark answer.]

Texas and Samuel Gloyd admit paragraph 11. [See paragraphs designated "5 to 19" of Texas answer.]

As to Paragraph 20 of the Complaint:

Admit, with respect to the averments contained in Paragraph 20 of the Complaint, that the defendant companies are engaged in the manufacture of gypsum products, principally gypsum board and gypsum plaster, at plants at various points throughout the United States so located as to have a readily accessible source of supply of raw gypsum rock, either through mining or quarrying operations in the immediate vicinity of the plant or through water transportation of the crude gypsum from the source of supply located at points distant from the plant; . . . U. S. G. sells a part of said gypsum products in interstate commerce to distributors within the States east of the Rocky Mountains. . . and sells a part of said gypsum products in commerce between the States and the District of Columbia. . . . [Paragraph 10, answer of U. S. G., Avery, and Knode.]

. . . the defendant, NATIONAL, is engaged in the manufacture of gypsum products, principally gypsum board and gypsum plaster, at plants located throughout the United States and allege that said defendant sells said products to dealers within the States east of the Rocky Mountains and in commerce between the States and the District of Columbia to dealers within the District of Columbia. [Paragraph 12 answer of National and Melvin H. Baker.]

. . . admits that each of the defendant companies is engaged in the manufacture of gypsum products, principally gypsum board and gypsum plaster, at one or more plants located throughout the United States, that each of the defendant companies sells a portion of the gypsum products so manufactured in interstate commerce in some or all of the States comprised within the Eastern area, that each of the defendant companies, with the exception of Texas, sells a portion of such gypsum products in commerce between the States and the District of Columbia to retail dealers in building products within the District of Columbia, and that the defendant companies manufacture and sell approximately 100% of all gypsum board, . . . [Paragraph 20 answer of Certain-teed and Hartley; paragraph 20 answer of Celotex and Dahlberg.]

. . . that the defendant companies are engaged in the manufacture of gypsum products at plants located at various points throughout the United States, and sell gypsum products to dealers and distributors in interstate commerce, and some of them in commerce between the states and the District of Columbia; admit that EBSARY operates but one manufacturing plant, and that its sales in the Eastern area of gypsum board manufactured by it amounted to approximately \$670,000.00 in 1939; admit that EBSARY has been engaged in the manufacture of gypsum blocks since 1911 and has been engaged in the manufacture of plaster since 1918, and has, since 1928, manufactured gypsum board; admit that EBSARY entered into license agreements with U.S.G. as set forth in Exhibits "3" and "6" annexed to the complaint: . . . [Paragraph 2, answer of Ebsary.]

Admit that Newark operates a gypsum board plant at Kearny, New Jersey, and a gypsum plaster mill at Newark, New Jersey, that U.S. G. and National operate plants in the United States and that Newark sells gypsum products manufactured by it in interstate commerce, . . . [Paragraph 7, answer of Newark.]

. . . admits he is engaged in the manufacture of gypsum products, with a plant at Plasterco, Texas, and sells said products principally east of the Rocky Mountains and west of the Allegheny Mountains in the southwestern states, . . . [Paragraph 20, answer of Gloyd, d/b/a Texas Cement Plaster Co.]

As to Paragraphs 21, 22, and 23 of the Complaint:

All the defendants (except National as to paragraph 23) admit the allegations of this paragraph. Each defendant (except Ebsary) says the description of paragraph 21 is not complete. Sales value and percentages mentioned in these paragraphs are not admitted.

[USG answer, paragraphs 11, 12, 13; National answer, paragraphs 13 and 14; Certain-teed, Celotex, and Texas answers paragraphs 21, 22, and 23; Newark answer, paragraphs 8, 9, 10.]

As to Paragraphs 24 and 25 of the Complaint:

All the defendants (except National and Newark as to both paragraphs 24 and 25, and Ebsary and Texas, as to paragraph 24) admit the averments of the first three sentences of paragraph 24 and the first four sentences of paragraph 25. USG admits the averments of the sixth sentence of paragraph 24. [USG answer, paragraphs 14 and 15;

Certain-teed and Celotex answers, paragraphs 24 and 25; Texas answer, paragraph 25.]

As to Paragraph 26 of the Complaint:

All the defendants admit that this paragraph describes gypsum board in a general way. [USG and National answers, paragraph 16; Certain-teed, Celotex, and Texas answers, paragraph 26; Ebsary answer, paragraph 4.]

As to Paragraphs 27, 28, 29 of the Complaint:

All the defendants substantially admit the allegation of these paragraphs. [USG and National answers, paragraphs 17, 18, and 19; Certain-teed, Celotex, and Texas answers, paragraphs 27, 28, and 29; Ebsary answer, paragraph 4; Newark answer, paragraphs 5, 12, and 13.]

As to Paragraph 30 of the Complaint:

The definitions contained herein are adopted by all defendants. [USG and National answers, paragraph 20; Certain-teed, Celotex, and Texas answers, paragraph 30.]

As to Paragraphs 31 and 32 of the Complaint:

USG admits that it was incorporated in 1901 and from that date to the present time it has been the largest producer of gypsum board and plaster in the United States, and that it produced and sold in 1929, approximately 55 per cent of all gypsum board sold in the Eastern area. USG further admits that in 1939 its sales in the Eastern area of gypsum board manufactured by it amounted to approximately \$10,600,000. USG also admits that during the 20 years preceding the filing of the complaint, it acquired the gypsum plants of 8 other producers, including the Niagara Gypsum Company which, at the date of its acquisition in 1929, had been engaged in the production of gypsum plaster and plaster board for 10 years and gypsum wallboard for 6 or 7 years. Likewise, USG admits that it now operates 16 plants in the Eastern area and that gypsum board is produced in 13 of said plants. USG further admits that since 1925 it has expanded

into fields of other allied building materials and is now a manufacturer of all the building material products listed in paragraph 32 of the complaint, except insulation wool. [USG answer, paragraphs 21 and 22.]

As to Paragraphs 33 to 38, inclusive, of the Complaint:

The allegations contained in paragraph 33 (except that National produces gypsum board at 8 plants instead of 7); paragraphs 34 and 35 (except that Certain-teed produces no paper); paragraph 36 (except the percentages used therein); paragraph 37, and 38 are admitted respectively by defendants National, Certain-teed Celotex, Ebsary, Newark, and Texas. [National answer, paragraph 22; Certain-teed answer, paragraph 35; Celotex answer, 36 and 37; Newark answer, paragraphs 15 and 16; Ebsary answer, paragraph 2; Texas answer, paragraphs 36 and 38.]

As to Paragraph 39 of the Complaint:

... admit that said defendant, United States Gypsum Company, sells most of the gypsum board and plaster manufactured by it to retail building material dealers located throughout the Eastern area, ... admit that since 1929 and for many years prior thereto defendant, United States Gypsum Company, has generally refrained from selling said gypsum products direct to contractors, ... [USG answer, paragraph 29.]

Certain-teed, Ebsary, Newark, (except as to last sentence) and Texas admit the allegations of paragraph 39 of the complaint. [Certain-teed answer, paragraph 39; Ebsary answer, paragraph 5; Newark answer, paragraph 17; Texas answer, paragraph 39.]

Celotex admits the allegations contained in the first two sentences of paragraph 39 but, in its admission, uses the word "some," instead of "most" as is used in the first sentence of the complaint. [Celotex answer, paragraph 39.]

As to Paragraph 40 of the Complaint:

The allegations of the first sentence of paragraph 40 of the complaint are substantially admitted by all the defendants except

Ebsary. As to the second sentence of paragraph 40, the defendants limit their answers to state, that although board is often transported in mixed cars or trucks of board, plaster, and miscellaneous gypsum products, straight carload and truck loads of board are frequently sold. [USG answer, paragraph 30; National answer, paragraph 25; Certain-teed, Celotex, and Texas answers, paragraph 40; Newark answer, paragraph 18.]

As To Paragraph 41 of the Complaint:

All the defendants admit the allegation of this paragraph of the complaint. [USG answer, paragraph 31; National answer, paragraph 26; Certain-teed, Celotex and Texas answers, paragraph 41; Ebsary answer, paragraph 5; Newark answer, paragraph 19.]

As to Paragraphs 48 to 53, inclusive, of the Complaint:

The defendants USG, Certain-teed, and Celotex (except as to validity of patents) admit the allegations of these paragraphs of the complaint. [USG answer, paragraphs 37, 38, 39, 40, and 41; Certain-teed and Celotex answers, paragraphs 48 to 53, inclusive.]

As to Paragraphs 64 and 65 of the Complaint:

USG admits that a copy of the Beaver Products Company license agreement is set forth in the complaint as Exhibit 2 in appendix. Furthermore, that the licenses to Universal, Atlantic, and Texas (with certain immaterial exceptions as to Atlantic and Texas) were similar to the Beaver license. [USG answer, paragraphs 49 and 50.]

As to Paragraphs 68 and 69 of the Complaint:

USG and Certain-teed admit that late in 1926 Certain-teed commenced to manufacture an open-edge board and sold it at a price below the closed-edge board. Furthermore they admit that the introduction of open-edge board on the market presented a competitive problem and that American, National, and Niagara companies sold a second-grade board at about the same price as that of open-edge board. [USG answer, paragraphs 53 and 54; Certain-teed answer, paragraphs 68 and 69.]

As to Paragraphs 70 and 71 of the Complaint:

USG and Certain-teed admit that Certain-teed acquired Beaver in 1928 and that USG refused to modify the Beaver license and that Certain-teed refused to assume the Beaver license. Admits that in 1928 American, Ebsary, and Niagara commenced manufacturing an open-edge board. [USG answer, paragraphs 55 and 56; Certain-teed answer, paragraphs 70 and 71.]

As to Paragraph 80 of the Complaint:

USG admits that copies of U. S. patent, No. 1, 230, 297 to Hite and U. S. patent, No. 1, 500, 452 to Haggerty, are set forth as Exhibits 4 and 5 of the appendix to the complaint. [USG answer, paragraph 65.]

As to Paragraph 85 of the Complaint:

USG admits that after it had agreed to acquire the Hite and Haggerty patents, it subsequently entered into license agreements with National, Certain-teed, Universal, Atlantic, Ebsary, American, and Kelley. [USG answer, paragraph 70.]

As to Paragraph 88 of the Complaint:

USG admits the averments of this paragraph of the complaint except that USG threatened to sue Texas for infringement of the starch patent.

As to Paragraphs 90 and 91 of the Complaint:

USG admits that it has fixed prices and has issued to its licensees minimum price bulletins, and that certain minimum price bulletins are set forth in Exhibit 7 in the appendix to the complaint. [USG answer, paragraphs 75 and 76.]

As to Paragraph 92 of the Complaint:

USG admits that through Board Survey it has enforced the terms and provisions of the price bulletins. [USG answer, paragraph 77.]

As to Paragraph 98 of the Complaint:

USG admits that copies of the U. S. patents, Nos. 2,017,022, 2,079,338, and 2,080,009 are set forth in the appendix to complaint as Exhibits 8, 9, and 10 respectively. [USG answer, paragraph 81.]

As to Paragraphs 113 and 114 of the Complaint:

USG admits that in 1934 it offered to grant to each of its licensees a license to manufacture and sell metallized board embodying the inventions and improvements set forth and claimed in patents and patent rights owned by USG and that such a license agreement was entered into with USG by American, Atlantic, Certain-teed, Ebsary, Kelley, National, and Universal. USG admits that the copy of the metallized board license agreement entered into with Ebsary, which is set forth as Exhibit 11 in the appendix to the complaint, is substantially identical with each of the metallized board licenses entered into with the other licensees. USG further admits that throughout the period from the execution of said license agreements to the date of filing the present complaint USG has determined the minimum price at which each licensee might sell gypsum board. [USG answer, paragraphs 94 and 95.]

As to Paragraphs 115, 116, 117, 118, and 120 of the Complaint:

All the defendants (except Newark) admit that early in 1936, USG offered to license its licensees to manufacture and sell perforated lath. [USG answer, paragraph 96; National answer, paragraph 83; Certain-teed, Celotex, and Texas answers, paragraph 115; Ebsary answer contains no denial.] The defendants USG, Certain-teed, Celotex, and Ebsary admit that the license agreement reserved to USG the right to fix prices for said lath. [USG answer, paragraph 97; Certain-teed, Celotex answers, paragraph 116; Ebsary answer, paragraph 20] USG admits that American, Certain-teed, Ebsary, and Kelley entered into similar agreements with USG and that a copy of said agreement is set forth in the appendix to the

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complaint as Exhibit 12. [USG answer, paragraph 98.] USG admits that from the date of said license agreement until May 1938 the minimum price so fixed was at a differential above the price of straight lath. [USG answer, paragraph 99.] USG further admits that the validity of their perforated lath patent has not been passed on by any court of the United States. [USG answer, paragraph 101.]